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90 U.S. 160.
Oct. T. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 164.

THE VILLAGE OF EVANSTON, PLAINTIFF IN ERROR,

vs.

JESSIE GUNN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 25, 1876.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 151.

THE CHESAPEAKE BOAT CANAL COMPANY, PLAINTIFF IN ERROR,

vs.

[illegible]

IN ERROR TO THE [illegible] COURT OF [illegible]

SUPREME COURT OF THE UNITED STATES.

No. 164.

THE VILLAGE OF EVANSTON, PLAINTIFF IN ERROR,

vs.

JESSIE GUNN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois held at the United States court rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Friday, the seventeenth day of December, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the one hundredth year.

WILLIAM H. BRADLEY,
Clerk.

JESSIE GUNN
v.
THE VILLAGE OF EVANSTON. } Trespass on the case.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty first day of April, A. D. 1875, came said plaintiff, by her attorneys, Messrs. Walker, Dexter and Smith, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois at Chicago in the district aforesaid her bond for costs and præcipe for a writ of summons against said defendant in said entitled cause; which said bond and præcipe are
2 respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, May term, A. D. 1875.

JESSIE GUNN
vs.
THE VILLAGE OF EVANSTON. } In

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by her, hereby agree and stipulate that execution may issue against my property for any costs taxed against her.

Dated this day of April, A. D. 1875.

JNO. C. SPRAY.
U. P. SMITH.

(Endorsed:) Filed April 21st, A. D. 1875. Wm. H. Bradley, clerk.

Præcipe.

U. S. OF AMERICA,
N. Dist. of Illinois, ss:

In the circuit court of the United States for the N. dist. of Illinois, of the May term, A. D. 1875.

JESSIE GUNN
vs.
THE VILLAGE OF EVANSTON. } Case. $20,000.00.

3 The clerk will please issue a summons in the above entitled cause, returnable to the May term of said court.

WALKER, DEXTER AND SMITH,
Pl'ff's Attorneys.

(Endorsed:) Filed April 21, 1875. Wm. H. Bradley, cl'k.

And on the same day, to wit, the 21st day of April, A. D. 1875, a writ of summons issued out of said clerk's office against said defendant in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of summons.

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon the village of Evanston, if found in your district, to be and appear before our judges of our circuit court of the United States, for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of May next, to answer unto Jessie Gunn, of a plea of trespass on the case, to her damage, as she alleges, of twenty thousand dollars, and have you then and there this writ.

4 Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago, aforesaid, this 21st day of April, in the year of our Lord one thousand eight hundred and seventy-five and of our Independence the 99th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Served the within writ by reading and personally delivering a true and correct copy thereof to Obadiah Huse, president of the village of Evanston, on the 22d day of April, A. D. 1875.

B. H. CAMPBELL,
U. S. Marshal,
By A. C. CAMPBELL.

(Endorsed:) Filed April 30th, A. D. 1875. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 22d day of April, A. D. 1875, said plaintiff, by her attorneys, filed in said clerk's office her declaration in said entitled cause; which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for said district. To the May term, 1875.

5 JESSIE GUNN }
vs.
VILLAGE OF EVANSTON. }

The pl'ff, Jessie Gunn, a citizen and resident of the State of Indiana, by Walker, Dexter and Smith, her att'ys, complains of the Village of Evanston, a corporation created under and by the laws of the State of Illinois, and a citizen and resident of said State of Illinois, and of the said district, def't of a plea of trespass on the case; for that, whereas the def't before and on the 30th day of April, 1873, was possessed and had control of a certain public sidewalk on a certain public street, to wit, a street called Sherman avenue, in said village, in the district aforesaid, and ought to have kept the same in good and safe repair and condition; yet the def't, not regarding its duty in that behalf, while it was so pos-

sessed and had the control of said sidewalk, to wit, on the day aforesaid, then wrongfully and negligently suffered the same to be and remain in bad and unsafe repair and condition, and divers of the planks wherewith the said sidewalk was laid to be and remain broken and unfastened, and leaving a dangerous hole through such sidewalk, beneath which said village had excavated or continued a deep ditch, by means whereof the plaintiff, who was then and there passing along and upon the
6 said sidewalk, then and there necessarily and unavoidably tripped and stumbled upon and against one of the said broken and unfastened planks of said sidewalk, and stepped into and through the hole in and through said sidewalk, made by such broken and unfastened plank in said sidewalk, and was thereby thrown and fell to and upon said sidewalk and the ground, and then and thereby the right thigh was bruised and the right thigh-bone fractured, wrenched, dislocated, bruised, and injured, so that thereby she became lame and disordered and so maimed for a long time, to wit, from thence hitherto, during which time she suffered great pain, and became thereby permanently lamed and diseased, and was greatly hindered in her business and affairs, and which malady hath constantly increased so that she is now a helpless invalid, wholly unable to pursue her avocation.

And also, by means of the premises, she was obliged to and did lay out and expend divers large sums of money, amounting to one thousand dollars ($1,000), in and about endeavoring to be healed of said wounds, sickness, and disorder, to the damage of the pl'ff of twenty thousand dollars ($20,000).

And whereas also the city of Evanston at the district aforesaid heretofore to wit, in the year 1873, was a duly incorporated city under the laws of the State of Illinois and was possessed and had control
7 of the streets therein and of the sidewalks along such streets and had the power and it was its duty to keep such streets and the sidewalks thereon in safe repair and condition, yet said city, not regarding its duty in that behalf, while it was so possessed and had control of said streets and sidewalks at the time aforesaid suffered the said sidewalk on a certain street, to wit, Sherman avenue in said city, to be and remain in bad and unsafe repair and condition and divers of the planks wherewith said sidewalk was laid to be and remain broken and unfastened; that underneath such sidewalk said city had excavated or continued a ditch for street drainage, so that there was a vacant space of to wit, four feet from the said sidewalk to the ground underneath it. That said city suffered said sidewalk to remain broken and in such unsafe condition for a long time to wit, four months prior to the injury complained of; that said city had been notified through its officers of such unsafe and broken sidewalk long before the injury to pl'ff complained of, and said city had neglected to repair the same; that by means of said broken sidewalk the pl'ff, who was then, to wit, on the 30th day of April, 1873, and there passing along and upon said sidewalk with all proper care and caution, then and there unavoidably and necessarily stepped into and through said hole in said sidewalk, and was thereby thrown down and fell upon said sidewalk and the
8 ground and thereby greatly injured, to wit, her thigh was bruised and her thigh-bone so wrenched and injured that although for a long time thereafter she suffered no considerable prolonged pain, yet said hurt generated a disease of the said bone and of the membrane covering the same and at its upper joint and a malady known as the hip disease, which was first made manifest and assumed a serious form long after such hurt and, to wit, in the month of January, 1874, when pl'ff first knew

that she had suffered a serious and lasting injury by such fall; that such disease consequent upon such injury has gradually developed to such an extent that she is wholly incapacitated from the pursuit of her profession or business as teacher, and she has for a long time past suffered therefrom great pain, and because of the incurable character of such hurt will never recover therefrom.

That she has been obliged to expend divers large sums of money, to wit, one thousand dollars ($1,000), in endeavoring to be cured of such injury.

That said city of Evanston abandoned its special charter as a city some time in the year 1873, and organized under the general incorporation law of said State as the village of Evanston and that defendant assumed all the obligations and liabilities of its predecessor said city of Evanston.

That the pl'ff suffered damage by reason of the negligence,
9 wrongs, and injuries, aforesaid in the sum of $20,000, and, therefore, she brings suit, &c.

WALKER, DEXTER & SMITH,
Att'ys for Pl'ff.

(Endorsed:) Filed April 22d, 1875. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 1st day of May, A. D. 1875, said defendant, by its attorneys, filed in said clerk's office its plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

United States circuit court, northern district of Illinois, May term, 1875.

JESSIE GUNN
vs. } Case.
VILLAGE OF EVANSTON.

And the defendant, by Geo. O. Ide, its attorney, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, in manner and form as the plaintiff has above thereof complained against it, and of this the defendant puts itself upon the country, &c.

By GEO. O. IDE,
Its Attorney.

(Endorsed:) Filed May 1, 1875. W'm H. Bradley, cl'k.

10 Afterwards, to wit, on the 1st day of June, A. D. 1875, said defendant, by its attorney, filed in said clerk's office its affidavit in said entitled cause, which said affidavit is in the words and figures following, to wit:

Affidavit.

UNITED STATES OF AMERICA,
Northern District of Illinois:

May term, 1875.

JESSIE GUNN
vs. } Case.
VILLAGE OF EVANSTON.

Geo. O. Ide, of Cook County, Illinois, being duly sworn, says that he
is the attorney of the defendant in the above cause, and on the 3rd day

of May, 1875, appeared in said cause and filed the plea of the general issue; that since the filing of said plea affiant has been informed of facts and circumstances relative to said plaintiff and the causes of action set up in her declaration and the date of the alleged injury complained of, of such character as to show that said causes of action did not accrue to said plaintiff, if at all, within two years next before the commencement of this suit, and that affiant now expects to be able to show, by evidence on the trial of this cause, that the plaintiff's cause of action and the said alleged injury, if a valid claim against said defendant, was barred by said statute of limitations of Illinois prior to the commencement of this suit; further, that at the time of filing said plea,
11 affiant had no information or knowledge of the facts above relied upon, and that the evidence upon which said defendant relies to sustain said bar of the statute but recently came to the knowledge of affiant and the present corporate authorities of said defendant; and further, that, from the lapse of time since the occurrence of said alleged injury and the changes in the officials of said defendant, it has, until within a few days past, been difficult to obtain the requisite information necessary to properly defend said cause, although affiant has, since the commencement of this suit, been diligently seeking to obtain, from all available sources, the requisite evidence and information to enable him to properly defend. Had deponent had such information he would have filed the additional plea with the plea of the general issue.

GEO. O. IDE.

Subscribed and sworn to before me this 1st day of June, 1875.

E. A. DRUMMOND,
U. S. Com.

(Endorsed:) Filed June 1, 1875. W'm H. Bradley, cl'k.

On the same day, to wit, the 1st day of June, A. D. 1875, in the adjourned May term of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, dis-
12 trict judge, is the following entry, to wit:

JESSIE GUNN
vs. } Case.
THE VILLAGE OF EVANSTON.

Now come the parties, by their attorneys, and on motion of the defendant, by its attorney, upon affidavit filed, leave is given it to file a plea of the statute of limitation.

And on the same day, to wit, the 1st day of June, A. D. 1875, said defendant, by its attorney, filed in said clerk's office its additional plea in said entitled cause, which said plea is in the words and figures following, to wit:

Additional plea.

United States circuit court, northern district of Illinois, May term, 1875.

JESSIE GUNN
vs. } Case.
THE VILLAGE OF EVANSTON.

And for a further plea in this behalf the defendant, by its attorneys, Paddock and Ide, says actionem non, because it says that the several

supposed causes of action in the said declaration mentioned did not, nor did any or either of them, accrue to the plaintiff at any time within two years next before the commencement of this suit in manner and form as the plaintiff has above complained against said defendant, and this said defendant is ready to verify.

13 Wherefore it prays judgment, &c.

By PADDOCK AND IDE,
Its Attorneys.

(Endorsed:) Filed June 1, 1875. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 8th day of November, A. D. 1875, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JESSIE GUNN
v.
THE VILLAGE OF EVANSTON. } Trespass on the case.

On motion of the plaintiff, by her attorney, leave is given her to file an additional count to her declaration herein.

And on the same day, to wit, the 8th day of November, A. D. 1875, said plaintiff, by her attorneys, filed in said clerk's office an additional count to her declaration in said entitled cause, which said additional count is in the words and figures following, to wit:

Additional count to declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the U. S. for the northern dist. of Illinois.

JESSIE GUNN
vs.
THE VILLAGE OF EVANSTON. } Case.

14 Additional count to declaration.

For that whereas also the defendant at the district aforesaid heretofore, to wit, on the 24th day of April, A. D. 1873, was a municipal corporation under the laws of the State of Illinois, and had the power and it was its duty to keep in safe condition and repair the streets, together with all walks, ways, drains, sewers, and culverts thereon or therein, so that the said streets should at all times be passable for and safe for the passage of persons along and over the same. Yet the defendant, not regarding its duty in that behalf at the time and place aforesaid, suffered certain of its streets, to wit, Sherman avenue, to be and remain in bad repair and in an unsafe condition, in this, that it authorized, directed, continued, and suffered a drain or sewer along the westerly side of such street, and which was about five feet in width and about five feet in depth, to be covered with planks for a long distance, to wit, six hundred (600) feet along said street, and to be used by footmen for a walk; and as and for the sidewalk along the westerly side of said street and for the whole distance so covered, and the said plank covering of such

drain or sewer was the only walk constructed along the westerly side of said street, when the same was so covered, and was generally and notoriously used as the walk or sidewalk by all persons having occasion
15 to pass that way; but such plank covering was imperfect and insufficient, and at the time aforesaid a plank thereof was broken and displaced, leaving a hole through such covering several feet in length and about six inches wide, and the defendant and the town of Evanston (to all whose rights and liabilities the defendant succeeded) had suffered said covering or walk to remain in such unsafe condition for a long time prior to the day aforesaid, and although it had been notified thereof it wholly neglected to repair such covering and make the said street safe for persons to pass along the same.

And plaintiff avers that by reason of such drain or sewer, and of the broken and imperfect covering thereof as aforesaid, the plaintiff, who was, to wit, at the time and place aforesaid, passing along said street and upon and along such covered sewer or drain so made for and used as a walk as aforesaid, with all proper care and caution, then and there fell through said broken covering, and was thereby thrown down upon said covering so used as a walk as aforesaid, and was thereby greatly injured, to wit: Her right thigh and thigh-bone and spine were so wrenched and injured as that she suffered great pain therefrom, and there was caused thereby, and resulted therefrom, a most painful and incurable disease, known as "hip disease," whereby she was totally disabled from pursuing her vocation, and is rendered a helpless and permanent invalid thereby, suffering constant and most severe pain.
16 That she has expended divers large sums of money in and about endeavouring to be cured and recover from such injury, to wit, one thousand dollars.

That the plaintiff has suffered damages by reason of the negligence, wrongs, and injuries aforesaid, in the sum of twenty thousand dollars; and therefore she brings suit, &c., by

WALKER, DEXTER AND SMITH,
Her Att'ys.

(Endorsed:) Filed Nov. 8, 1875. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 11th day of November, A. D. 1875, said defendant, by its attorney, filed in said clerk's office its plea to said additional count to the declaration in said entitled cause, which said plea is in the words and figures following, to wit:

Plea to additional count of declaration.

United States circuit court, northern district of Illinois, October term, 1875.

JESSIE GUNN
vs.
VILLAGE OF EVANSTON.

And the defendant, by Geo. O. Ide, its attorney, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge in the additional
17 count to the declaration, or any or either of them, in manner and form as the plaintiff has above thereof complained against it in said additional count; and of this the defendant puts itself upon the country, &c.

And for a further plea to said additional count, the defendant, by its said attorney, says actionem non, because it says that the several supposed causes of action in the said count mentioned did not, nor did any or either of them, accrue to the plaintiff at any time within two years next before the commencement of this suit in manner and form as the plaintiff has above complained against said defendant in said additional count. And this said defendant is ready to verify. Wherefore it prays judgment, &c.

By GEO. O. IDE,
Its Attorney.

(Endorsed:) Filed Nov. 11, 1875. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 14th day of December, A. D. 1875, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JESSIE GUNN
v.
THE VILLAGE OF EVANSTON. } Trespass on the case.

18 Now come the parties, by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit: John Batten, William L. Church, jr., L. M. Osterhaudt, C. G. Miller, A. Hall, T. W. Edmonds, Charles Newcomer, B. T. Lee, George W. Oyter, D. E. Adams, A. B. Fish, and Elisha Gridley, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 15th day of December, A. D. 1875, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JESSIE GUNN
v.
THE VILLAGE OF EVANSTON. } Trespass on the case.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn, and after hearing the concluding evidence, the hour of adjournment having arrived, the further trial of the cause was postponed until to-morrow morning.

Afterwards, to wit, on the 16th day of December, A. D. 1875, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W.
19 Blodgett, district judge, is the following entry, to wit:

JESSIE GUNN
vs.
THE VILLAGE OF EVANSTON. } Trespass on the case.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empanelled and sworn, and after hearing the arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict; and by agreement of the parties, by

their attorneys, the jury when they shall have agreed upon a verdict may sign and seal the same and deliver it to the clerk and disperse.

Afterwards, to wit, on the 17th day of December, A. D. 1875, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JESSIE GUNN
vs.
THE VILLAGE OF EVANSTON. } Trespass on the case.

The jury in this behalf empanneled and sworn this day returned into court their sealed verdict, wherein they say we, the jury, find the defendant guilty, and assess the plaintiff's damages to the sum of six thousand and five hundred dollars.

20 And thereupon the defendant, by its attorney, moves the court for a new trial herein.

Afterwards, to wit, on the 8th day of January, A. D. 1876, said defendant, by its attorney, filed in said clerk's office its motion for a new trial in said entitled cause, which said motion is in the words and figures following, to wit:

Motion for a new trial.

United States circuit court, northern district of Illinois, October term, A. D. 1875.

JESSIE GUNN
vs.
THE VILLAGE OF EVANSTON. } Case.

And now comes the defendant, by Geo. O. Ide, its attorney, and moves the court to set aside the verdict rendered and to grant a new trial in this cause, for the following grounds:

1st. The court admitted on the trial improper evidence on the part of the plaintiff, to wit, the so-called record of the weather from the Signal Service station.

2d. The court improperly refused to instruct the jury as asked in each of the defendant's written requests.

3d. The court improperly instructed the jury that at the time of the injury done to the plaintiff the defendant was bound to repair the place in question where the injury occurred.

4th. The court improperly instructed the jury that defendant
21 is liable for all want of repairs in its walks or roadways, without reference to notice to the corporate authorities of the defect. In this the instruction was too broad and tended to mislead the jury.

5th. The verdict is contrary to the law of the case.

6th. The verdict is contrary to the evidence in the case.

7th. The damages are excessive.

8th. The instruction to the jury that they should take into consideration the evidence of the violence of the wind, &c., being based upon incompetent evidence, was improper.

9th. The charge to the jury concerning the lack of care shown by plaintiff, after the accident of her injured limb, and that she was in

effect excused by not feeling pain in her hip, &c., is not supported by the evidence.

STILES AND IDE,
For Def't.

(Endorsed:) Filed Jan'y 8, '76. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 10th day of January, A. D. 1876, in the December term, A. D. 1875, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

22 JESSIE GUNN
v.
THE VILLAGE OF EVANSTON. } Trespass on the case.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendant heretofore entered herein for a new trial of this cause, and after hearing the arguments of counsel, the court being sufficiently advised in the premises overrules said motion, and awards judgment on the finding.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of six thousand and five hundred dollars, her damages so as aforesaid assessed, together with her costs and charges in this behalf expended, amounting to the sum of sixty-three dollars and fifty-five cents.

And on the same day, to wit, the 10th day of January, A. D. 1876, on the hearing of said cause, the following exceptions were taken and allowed by the court, and entered of record in said entitled cause, and are in the words and figures following; to wit:

23 And afterwards, to wit, on the 21st day of January, A. D. 1876, said defendant filed in said clerk's office its supersedeas bond in said entitled cause, which said bond is in the words and figures following, to wit:

Supersedeas bond.

Know all men by these presents that the village of Evanston, in the county of Cook and State of Illinois, as principal, and Obadiah Huse, W. N. Brainard, Charles J. Gilbert, William Blanchard, of said county, as sureties, are held and firmly bound unto Jessie Gunn in the penal sum of thirteen thousand dollars, for the payment of which well and truly to be made to the said Jessie Gunn, her heirs, executors, administrators, or assigns, the said village binds itself and its successors, and the said sureties do bind themselves, their heirs, executors, and administrators, jointly and severally and firmly by these presents.

In witness whereof the said village of Evanston has caused its corporate name to be hereto subscribed by the president of its board of trustees, attested by its corporate seal and the signature of its clerk, and the said sureties have hereto set their hands and seals, this fourteenth day of January, A. D. 1876.

The condition of the above obligation is such that whereas the said village of Evanston has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the circuit court of the United States for the northern district of Illinois, at
24 the December term, A. D. 1875, thereof, in a certain cause where-

in said Jessie Gunn was plaintiff, and said village of Evanston defendant:

Now, therefore, if the said village of Evanston shall prosecute its writ of error to effect, and if it fail to make its plea good shall answer all damages and costs, then this obligation to be null and void; otherwise, to remain in full force and effect.

[SEAL.]

VILLAGE OF EVANSTON,
By OBADIAH HUSE,
President of the Board of Directors.

Attest:
ROB'T R. SCOTT,
Village Clerk.

OBADIAH HUSE. [SEAL.]
W. N. BRAINARD. [SEAL.]
CHA'S J. GILBERT. [SEAL.]
W'M BLANCHARD. [SEAL.]

Witnessed by—
GEO. O. IDE.

Approved:

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Jan'y 21st, 1876. W'm H. Bradley, clerk.

Bill of exceptions.

25 United States circuit court, northern district of Illinois, December term, A. D. 1875.

JESSIE GUNN
vs.
THE VILLAGE OF EVANSTON. } Case.

Be it remembered, that on the trial of the issues in this case, before a jury, in said court, the plaintiff to maintain the issue on her part, introduced testimony tending to show,

1. That pl'ff had been a teacher in the public schools in the town of Evanston, in Cook County, Illinois, and in April, 1873, lived at the house of one Gillespie, located on the west side of Sherman avenue, between Church and Clark streets, within the corporate limits of the defendant; that in that locality, on the west side of Sherman avenue, and between said streets there was no sidewalk for foot passengers laid on the usual sidewalk line, but that in the said avenue, which is 100 feet wide, and at the distance of twenty feet from the west line of said avenue there was a ditch or drain running north and south through the entire limits of the village for some distance until it emptied into Lake Michigan; that in front of said block the ditch was covered over
26 with planks laid lengthwise over cross-pieces resting upon the plank sides of the drain; that the covering was put on by individuals owning property on that block, in the summer of the year 1871, for a sidewalk as well as to cover the drain, and had since then been used as a sidewalk by people living or passing in that locality, and there was no other sidewalk there; that when the plaintiff lived at said Gillespie's house a narrow plank walk led from the gate of Gillespie's lot to the covered drain, and that it was the custom of the plaintiff and the people with whom she lived, to pass to and over the covered drain, and to use the same as a sidewalk, there being no regular sidewalk con-

structed in the space allotted for sidewalks along the line of Gillespie's fence, and other owners north of said lot to the next east & west street.

2. That there was a hole in the planking over said drain some six or eight inches wide and some two to four feet long, which had been accidentally made, in the fall of 1872, by a runaway team crushing and breaking out the end of a board; and that this hole had been insufficiently covered by the lot owner, but had been broken again & remained unrepaired some weeks prior & down to the time the plaintiff fell into it. That the lot owner had notified the ex st. com'r of it, supposing he was still commissioner, & that the town & village officers were only 2 or 3 blocks off.

3. That on the morning of the 22nd day of April, 1873, the plaintiff, while on her way to her school, and while passing along over the
27 drain cover, fell into this hole with her right leg, whereby she sustained a severe wrench of the back and hip joint, which caused her severe pain and fainting at the time, and from the effects of which she subsequently experienced much suffering and inconvenience, gradually increasing to such an extent that in April, 1875, she was compelled to cease school-teaching and place herself under the care of surgeons for medical treatment. That she was then receiving $65 per month; had taught but about 2½ years, was about 21 years old; had been twice promoted; was a strong, healthy young woman.

4. That the plaintiff knew of the existence of this hole in the walk, and its locality, for a period of about four months or more prior to the injury, and had been in the habit of passing by it daily on her way to and from school, at least four times a day, and had always theretofore passed it safely and without difficulty; but that on the morning of the accident and in the evening before snow had fallen and covered the hole over so that it was not visible to her on that morning. That it occurred to her, and it was present in her mind (as the plaintiff herself testified) that there was a hole in the walk, and that as she stepped from the walk leading from the house to the alleged sidewalk, which was the said covered drain, she thought of the hole, and thought she knew where it was, and stepped, as she thought, away from the hole, and while
28 trying to avoid it stepped nto it. That she never had had any trouble before in passing it, and could have seen it then but for the snow; that the hole was a few feet to the north of the walk or passage leading to Gillespie's house to the walk or drain and east of the centre of the drain.

On cross-examination evidence was elicited tending to show—

5. That the walk on the drain was the usual width of the town sidewalks and made of 2 in. planks, and five feet or more wide; that between the walk so made and the fence in front of Gillespie's house and lot the space was twenty or more feet wide; that this space was occupied by a park for trees about fifteen or more feet wide, and that between the park and the lot fence there was a space left for a sidewalk in the usual place of the uniform width of six feet, running from Gillespie's gate to the sidewalk on the next street north, on which street to the west the school house where plaintiff taught was located, and that by passing along this space the plaintiff could have avoided the proximity of the hole, but such space was rough & had never been used or improved as a footwalk. Also that the park on the side nearest the drain-cover was protected by a railing, and that (as the plaintiff testified) if the plaintiff had, on the occasion of the accident, chosen to walk on the ground between this railing and the drain-cover instead of on the

drain she would have avoided the hole, but that she did not at the time think it was necessary to do so.

29 6. The plaintiff further introduced testimony of physicians and surgeons tending to show that the plaintiff was suffering under a disease of the hip-joint and a curvature of her spine, which, in their judgment, was caused by physical injury, and that in their judgment, if the plaintiff's account of the accident to her be true, her disease and present physical condition were attributable to such accident, and that if she ever recovered it would be after 2 or 3 years of illness, & with a limb shortened about 3 inches, and that her chance for recovery was doubtful. That the disease is insidious in approach & delusive in symptoms, and the course of pl'ff in continuing teaching, though suffering more or less, was not careless, but it is usual for persons so suffering to work on, if circumstances require it, not suspecting the dangerous disease with which they are threatened.

7. The plaintiff further introduced testimony tending to show that when this drain cover was built by the owners of lots in its locality the town authorities of the town of Evanston, the predecessor of the defendant, were aware of and assented to its erection, and did not interfere to prevent it, but assisted, in places, in causing crossings for the street north and the street south of this block, running east and west, and also for an alley running through the block to the drain, to be built over the drain, at the expense of said town.

30 8. The plaintiff further introduced as testimony the records of the town of Evanston, and of the defendant, showing that the town of Evanston was incorporated as a municipal corporation on December 29th, 1863, under the general law of the State of Illinois, approved March 3rd, 1845, found in division one of chapter 25, revised statutes of Illinois of 1845, and that the defendant, as the successor of said town, by vote of its citizens changed from an incorporated town to an incorporated village, & was incorporated as a village by such vote, on October 15th, 1872, under the provisions of the general law of Illinois, entitled "An act to provide for the incorporation of cities and villages," approved April 10th, 1872.

9. The plaintiff also offered to read in evidence from the record-book of the said old town of Evanston, an ordinance purporting to have been passed by the president and board of trustees, defining the duties of the street commissioner to be, "to keep in repair streets, ditches, drains, cross-walks, and side-walks, under the order and directions of the board of trustees," which the court admitted, provided it was shown to have been published, but directed the jury to disregard it if not satisfied from the proof that it was duly published. Pl'ff also offered evidence tending to show that the trustees of the old town in 1864 had

31 appointed a committee to publish said ordinance, and that a bill for printing said ordinance had subsequently been audited and paid.

10. The plaintiff further read in evidence from said record resolutions of the trustees of said old town tending to show that the street comm ssioner had been authorized to deepen the ditch and to side it up with planks within the corporate limits of the town, & had so done; and that sidewalks and crossings on streets crossing the ditch had been constructed so as to pass over the ditch, under the authority of the trustees.

11. The plaintiff further offered in evidence the record kept by a person employed by the United States Signal Service at Chicago, Illinois, for the purpose of showing the direction and velocity of the wind, the

state of the weather, and that snow had fallen on the morning the plaintiff met with the accident; to which evidence the defendant objected, because there was no law authorizing such record to be used in evidence, and because the same was not competent testimony; but the court overruled the objection and permitted said record to be read to the jury, showing that a snow-storm occurred on the evening of April 21st, 1873, and continuing until the morning of the next day, and that wind blew at the rate of 20 miles an hour on the night of the 21st April, and at 24 miles in the morning of the 22nd April, 1873, and that snow fell at that time sufficient to make $\frac{17}{100}$ of an inch in melted snow; to which ruling of the court in overruling said objection and permitting said record to be read to the jury the defendant then and there
32 excepted. It being also proven that Evanston was located about ten miles north of Chicago, where said record was kept, and that said snow-storm was as severe in Evanston as in Chicago.

The defendant, to maintain the issue on its part, introduced evidence tending to prove—

1. That from the time of the organization of the village of Evanston on October 15, 1872, under the general act of the legislature of Illinois, approved April 10, 1872, above mentioned, up to the month of June, 1873, no appropriations, under said law, had been made by said village, and that the first appropriation ordinance under said law, made by said village, was adopted by said village in June, 1873.

2. The defendant further proved that the ditch in question, as originally dug, was dug in the year 1855, prior to the incorporation of the town of Evanston, on what is now called Sherman avenue, and through other lands, now embraced within the corporate limits of the defendant, by certain drainage commissioners, incorporated as such, and so empowered by an act of the legislature of Illinois, in force Feb. 15, 1855, and read in evidence the said law, giving the said commissioners authority to dig the said ditch or drain, and to keep the same in repair, and creating them an incorporation, with succession, for said purposes.

3. The defendant further produced testimony of witnesses tending to show that by actual measurement the distance at the time of the plaintiff's accident from the front gate of Gillespie's place to the covered ditch was thirty feet and five inches; that the cover of the ditch
33 or walk on which the plaintiff's alleged accident occurred was six feet and five inches wide; that the distance from the west line of the ditch cover to the railing of the park was three feet; that the passage-way, left for a sidewalk, between the park and in front of Gillespie's place, was nine feet wide, and that the ground in the passage-way was hard, dry sod, and that there was no obstacle there at the time of the accident to prevent a person passing along this passage-way from Gillespie's house to the sidewalk on the street north on the way to the school where plaintiff taught; that the hole mentioned by the plaintiff in the covered drain was six inches from the east side of the covered drain; that the distance from the top of the cover down to the bottom of the drain, or to the water, was four feet; that the board of trustees of the town of Evanston had never by any recorded proceedings authorized said sewer to be covered over, nor had the board of trustees of said town, or of the defendant, ever authorized, by any vote or recorded proceedings, a sidewalk to be laid on the top of said drain; and that no street commissioner had ever consented, by any direct act, that the cover to said sewer should be built or used for the purposes of a sidewalk; although it was shown that the street commissioner acting at the time said planking was done was aware of the fact that the lot owners doing

the same expected it to be used as a walk, and did the planking at the public expense at the intersecting of streets and alleys.

The court thereupon charged the jury as follows:

34 Gentlemen of the jury: This action is brought to recover damages alleged to have been sustained by the plaintiff by reason of the neglect of duty on the part of the defendant. The defendant is a municipal corporation, which was organized some time in the year 1863 under the general law of this State then in force. On the 15 October, 1872, it adopted a general law for the incorporation of cities and villages, approved by the legislature of this State on the 10th April, 1872, and from that time forward has been acting under the provisions of that law.

It is claimed on the part of the plaintiff that as such municipal corporation the defendant was charged with the duty of keeping its streets and public thoroughfares in repair, and in safe condition for use by the public. That on or about the 22nd day of April, 1873, the plaintiff, while passing along one of the streets of said town, fell through a hole in the sidewalk for foot-passengers, by which she sustained injuries which have rendered it probable that she will be disabled for life.

That defendant insists, by way of defence, first, that the place where the injury complained of occurred was not a sidewalk nor a part of the roadway of said street, but was only a covering to a ditch or drain running along said street; second, that said accident occurred from the want of due care on the part of the plaintiff herself, that is, that she

35 was guilty of such negligence as not only necessarily contributed to, but caused the accident complained of; and that the actual injury from the fall was of a slight nature, and that the serious consequences since developed were not the necessary result of the fall, but were in consequence of her neglect of what was, in fact, only a slight injury, and became serious from want of attention on her part; third, that the ditch in question was dug by the drainage commissioners, and that the town of Evanston is not responsible for the consequences that may follow from the plaintiff falling into the same or through the cover thereof; fourth, that the defendant had no funds to make repairs at the time this accident occurred under the laws then in force.

I will dispose of the last two objections, as they are of a technical nature and arise under the law. This corporation, as I have already said to you, it appears from the evidence, without dispute, was first organized in 1863 or 1864, under the general law of 1845, with the amendments thereto. Some time in the year 1857 the ditch in question had been dug by the drainage commission for the purpose of draining certain wet lands in and about the town of Evanston. It passed along Sherman avenue, between the centre and the west side, in the vicinity of where this accident occurred, nearly parallel with the street; was of the depth of about five feet, and in the summer of 1871 it had been covered over in some places at the expense of the property owners

36 fronting upon the street in that vicinity, and at the street and alley crossings at the expense of the town. It is claimed, therefore, that the town was not responsible for the consequences of the plaintiff falling into this ditch, because the town did not dig the ditch. I say to you, as a matter of law in this case, that if this corporation found this ditch there, when it came into a corporate existence, as a part of the drainage system for that locality, running along one of the streets, it was bound, in some form, to protect the public against danger from said ditch in said street, and it makes no difference for the purposes of this case whether the ditch was a drain formed by nature and existing from time immemorial, or whether it had been created by artifi-

cial means only a few years prior to the formation of this corporation. If it was rightfully there when the corporation came into existence, then they were bound to accept it and provide for the safety of its citizens against it. The other objection is that this defendant had no funds to make repairs at the time this accident occurred.

As has already been explained to you in the testimony, without any contradictory testimony bearing upon that question, it appears that this ditch, at the point in front of M'r Gillespie's house, and in fact in front of the entire block in which his house was situated, had been covered over with two-inch plank, and might therefore be called a covered sewer.

37 In other places it might have been an open sewer, but here it was a covered sewer. No matter who covered it, whether the citizens covered it at their expense, or whether the town covered it, it was a covered sewer. As an existing fact, and as such, it was the duty of the town authorities, inasmuch as it was in the roadway where the citizens were liable to pass back and forth, to keep it in repair; and the fact that the corporation had changed its organic law a few months prior to this transaction, and had not yet reached the term of its municipal year, when it could make an appropriation under the law under which it was then existing, does not relieve it from the liability to keep this street in repair.

In regard to the first point of the defense, then, I will say to you, if you find, from the evidence in this case, that the place where the plaintiff received the injuries complained of was generally used by persons passing along said street, and on the west side of said street, as a walk for foot passengers, and that the same was out of repair by reason of a large hole therein, so as to be unsafe, and had been so out of repair for some time, say several weeks, or, as some testimony tends to show, from the preceding fall, and that the plaintiff, while in the use of due care on her part, that is, such care as a person of ordinary prudence would exercise under the same circumstances, fell into the said hole and was injured thereby, then the defendant is liable for the damages

38 directly resulting to the plaintiff from such injury; and it makes no difference for the purpose of this case whether it was originally intended that the cover of this drain should be used for a sidewalk or not, if the public accepted and used it as such, without objection from the town authorities; it was negligence on the part of the defendant to leave it open in such a manner as to endanger the persons who did use it. It fairly may be likened to the municipal authorities allowing a hole to remain in the roadway where the public were accustomed to pass along; if they had allowed a large hole to be dug in the roadway by strangers, and a person lawfully using the road had fallen into it, the authorities would have been liable, although they might not have dug the hole nor have authorized it to be done; but they have such control over their streets that they are bound to see that no person leave a trap into which persons using the street may fall.

If you find, from the evidence, that the accident to the plaintiff occurred by reason of her own negligence or want of due care, then the defendant is not liable. What is negligence, is a question of fact to be decided by the jury under all the circumstances of the case as shown in the proofs. The plaintiff admits that she knew there was a hole in the sidewalk at the point where she fell through it. She also states that the walk or the drain cover in question was covered with snow which

39 had fallen during the night before, and that the hole was obscured or covered up so that she could not see it.

The evidence also shows, or tends to show, rather, that it had

snowed the night before, with a violent wind, or a 20-mile wind, blowing from the northeast. It is for you to say whether those facts—that is, the snow and the wind combined—do not substantially corroborate the plaintiff in that regard, and show a state of facts that might have covered up this hole, or obscured it, so that she was unable to see it. She states that she had it in her mind that there was a hole there, and in endeavoring to avoid it, and in endeavoring to step so as to step over it, or beyond it, stepped into it. The plaintiff admits, as I said before, that she knew there was a hole, and, knowing that fact, she was bound to use due caution to avoid it; but if you believe, from the evidence, that she did use such caution as a prudent person would have used for the purpose of avoiding it, and yet fell into it, then the defendant is liable, because the very anxiety to avoid danger may sometimes lead us into it. This person may have supposed that she was stepping far enough to step over the hole which she knew was there, and stepped just far enough to step into it, especially if you find that the hole was obscured or covered by snow. Those are facts, however, for you to weigh in the light of all the testimony concerning it, and to say whether the accident occurred by reason of want of due care on the part of the plaintiff or not.

If you further find from the evidence that the plaintiff, after receiving the injury complained of by falling into the hole in question,
40 was guilty of negligence, by not taking proper care of herself, or resting, if rest was needed, or necessary, or that she failed to consult physicians under circumstances which would have justified a prudent person in consulting a physician, and that the hip disease, from which she is now suffering, is not the necessary result of her fall, but has become developed, either by constitutional predisposition thereto in her system or by her own neglect, then the defendant is not liable for the aggravated form of disease under which the plaintiff is now suffering. Negligence in this regard is a question of fact to be determined by you from all the evidence in the case. The medical evidence tends to show that the fall in question was a sufficient cause to produce the developed disease from which the plaintiff is now suffering. It also tends to show that the progress of the disease is very stealthy and insidious, and that the pain is not felt at the point where the disease is intrenching itself, but at points remote therefrom, such as the knee-joint, or in the back, and therefore not liable to call attention to the place where the injury is becoming deep-seated. You must determine from all the testimony in the case, therefore, whether there was anything in the symptoms in this case, from time to time, as the malady progressed, which should have awakened the fears of a prudent person so as to have caused her to think that it would be prudent for her, at that time, to have consulted physicians, or whether it was one of those cases
41 where she felt pain in her knee or pain in the back, or pain, perhaps, almost anywhere except right at the hip-joint where the mischief was going on, and knowing that she had no trouble in the knee or in the back, that was apparent, she therefore attributed nothing to the fall, and allowed it to go on until it became as serious as it now is.

You must determine from all the testimony, first, whether the disease under which the plaintiff is now suffering is directly traceable to the fall in question, or whether it originated from other causes. The medical testimony tends to show that it is so directly traceable, and that the fall furnishes a sufficient explanation for the extent of the disease. It is for you to weigh all this testimony. Second, you must determine whether a person of common prudence and intelligence would have

deemed it necessary from the symptoms developed in the plaintiff after the fall to have apprehended serious consequences at an earlier date than she did, and whether she was, under all the circumstances detailed by the proof, guilty of any negligence in not taking proper care of herself after the fall. If you find from all the evidence in the case that the defendant was guilty of negligence, it will then be your duty to fix the amount of damages which the plaintiff should recover in this case.

Those damages should be the direct and necessary result of this accident. They should not be speculative or hypothetical nor should
42 they be too remote. You have the right to take into consideration the plaintiff's profession or occupation, the wages she was earning at the time of the accident, but not her expectation of an advance of those wages, because that expectation was liable to disappointment in various ways. She might have lost her situation; her employers might have become dissatisfied with her and not promoted her any higher. They might have thought they had given her all the promotion to which she was entitled, and therefore any possibility or hope on her part of promotion and higher wages is not to be considered by you.

But you must take her as the proof shows she stood at the time the accident befel' her. You should also consider the sphere in life in which she was acting, her age, and the state of her health, as indicating a probability of the continuance of her ability to earn at least the amount which she was then earning, and to continue to enjoy her life. The general rule of damages for personal injuries in cases like this is that the jury should take into consideration the loss of time during which the plaintiff will be unable to follow any remunerative occupation, the expenses of medical treatment and for her support during the time which is necessary for her to get cured of her injury, the pain and suffering undergone by the plaintiff by reason of her injuries, and any permanent injury, especially when it causes inability to follow a profitable vocation, and consequent pecuniary loss. There is nothing in this case calling for vindictive or exemplary damages in the nature of
43 punishment, but the damages should be limited to the pecuniary loss which the plaintiff has sustained, as settled by the proof under the rules which I have given you. The damages should not be determined by any feeling of sympathy for the misfortunes of the plaintiff, but by your own judgment as to what sum will, as nearly as possible, make her good. No sum of money will relieve her from the pangs of pain she has suffered, or must suffer hereafter. You can only, as far as money is concerned, make her good for the money which she would have earned and the actual damages she has sustained.

If you find that the plaintiff has made out a case of negligence as against the defendant, you will then be justified in finding the defendant guilty. If you so find, you will then fix the amount of damages, and say by your verdict, "We, the jury, find the defendant guilty," and assess the damages at such an amount as you shall fix upon the proof. If you find the defenses made out, or that pl'ff has not made out her case, you will simply say, "We, the jury, find the defendant not guilty."

The defendant, on the giving of such charge to the jury, objected, and excepted to that portion of the charge which stated, "I say to you, as a matter of law in this case, that if this corporotion found this ditch there when it came into a corporate existence, as a part of the drainage system for that locality, running along through one of these streets or thoroughfares, it was bound in some form to protect the pub-
44 lic against danger in the use of that thoroughfare with the ditch in it, and it makes no difference for the purpose of this case

whether the ditch was a natural drain, formed by nature and existing from time immemorial, or whether it had been created by artificial means only a few years prior to the formation of this corporation. If it was there when the corporation came into existence, then they were bound to accept it and provide for the safety of the citizens against it, as they would any other obstacle that threatened the safety of the citizens using the streets."

Also, to that portion of the charge which stated, "No matter who covered it, whether the citizens covered it at their expense, or whether the town covered it, it was a covered sewer; that was the existing fact, and, as such, it was the duty of the town authorities, inasmuch as it was in the roadway where the citizens were liable to pass back and forth, to keep it in repair; and the fact that the corporation had changed its organization a few months prior to this transaction, and had not yet reached the term of its municipal year, when it could make any appropriation under the law under which it was then existing, does not relieve it from the liability to keep this street in repair."

Also, to that portion which stated, "In regard to the first part of the defense then, I will say to you, if you find from the evidence in this case that the place where the plaintiff received the injury complained of was generally used by persons passing along said street and
45 on the west side of said street as a walk for foot-passengers, and that the same was out of repair by reason of a large hole therein, so as to be unsafe, and had been so out of repair for some time, say several weeks, or, as some testimony tends to show, from the preceding fall, and that the plaintiff, while in the use of due care on her part, that is, such care as a person of ordinary prudence would exercise under the same circumstances, fell into the said hole and was injured thereby, then the defendant is liable for the damages directly resulting to the plaintiff from such injury; and it makes no difference for the purposes of this case whether it was originally intended that the cover of this drain should be used for a sidewalk or not; if the public accepted and used it as such without objection from the town authorities, it was negligence on the part of the defendent to leave it open in such a manner as to endanger the persons who did use it."

Also to that portion which states, "The evidence also shows, or tends to show, rather, that it had snowed the night before, with a violent wind, or a 20 mile wind, blowing from the northeast. It is for you to say whether those facts—that is, the snow and the wind combined—do not substantially corroborate the plaintiff in that regard and show a state of facts that might have covered up this hole, or obscured it, so that she was unable to see it."

Also to that portion which states, "She states that she had it in her mind that there was a hole there, and in endeavoring to avoid it,
46 and in endeavoring to step so as to step over it, or beyond it, stepped into it. The plaintiff admits, as I said before, that she knew there was a hole, and knowing that fact, she was bound to use due caution to avoid it; but if you believe, from the evidence, that she did use such caution as a prudent person would have used for the purposes of avoiding it, and yet fell into it, then the defendant is liable, because the very anxiety to avoid danger may sometimes lead us into it. This person may have supposed that she was stepping far enough to step over the hole which she knew was there, and stepped just far enough to have stepped into it, especially if you find that said hole was covered or obscured by snow at the time. These are facts, however, for you to weigh in the light of all the testimony."

Also to that portion of the charge which states, "If you find that the plaintiff has made out a case of negligence as against the defendant, you will then be justified in finding the defendant guilty."

The defendant, at the time of the giving of said charge, requested the court to give the following instructions to the jury, and to incorporate the same in the charge, to wit:

1. That the defendant is not liable in this case for the alleged injury to the plaintiff, if, at the time said injury occurred, the defendant, by the provisions of the general law for the incorporation of cities and villages, under which the defendant was then acting, had not the legal ability as well as the power to make repairs on its streets and sidewalks.

47 If the evidence shows that the defendant became a municipal corporation or village under the law mentioned, on October 15th, 1872, and that no appropriations by ordinance had been made for the corporate purposes of the defendant since that date and prior to the alleged accident, then the jury are instructed, as matter of law, that the defendant, during the interval of time between its organization as a village on Oct. 15th, 1872, and the third Tuesday of April, 1873, and the passage and going into effect of an appropriation ordinance, did not have the legal ability to raise and expend money for repairs of streets and other corporate purposes, and, in such case, is not liable for not repairing the place in question at and prior to the time the plaintiff received her injury.

2. That it must be proven to the jury that the plaintiff, at the time of receiving her injuries, was exercising reasonable care, and such as was suited to the nature of the case, to avoid falling into the hole in the drain-cover in question. Even though negligence on the part of the defendant be made out, yet, if the evidence shows that the plaintiff knew of the defect in question and went in its proximity, knowing also that there was a drain beneath, and thereby exposed herself to danger, the plaintiff, by thus exposing herself to danger, contributed to the injury, and under such circumstances cannot claim a right to recover of

48 the defendant.

The first of which instructions the court refused to give, and refused the second for the reason, as assigned by the court, that it was substantially embraced in the charge, to which refusal to give said instructions, and each of them, as asked, the defendant then and there excepted.

And thereupon, the jury having retired and returned a verdict for the plaintiff, the defendant moved for a new trial, which was overruled, and judgment entered upon the verdict for the plaintiff, to which the defendant then and there excepted.

And, forasmuch as the foregoing facts do not appear of record, the said defendant prays that this, his bill of exceptions, be signed and sealed by the court and made a part of the record, which is accordingly done.

[SEAL.] H. W. BLODGETT,
Judge.

(Endorsed:) Filed Jan'y 10, 1876. W. H. Bradley, cl'k.

49 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Jessie

Gunn is the plaintiff and The Village of Evanston is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 28th day of August, A. D. 1876, and of our Independence the 101st year.

[SEAL.] WM H. BRADLEY, *Clerk.*

50 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between Jessie Gunn, plaintiff, and The Village of Evanston, defendant, a manifest error hath happened, to the great damage of the said The Village of Evanston, as by its complaint appears, and it is being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1876, in the Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fifteenth day of January, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundredth year.

[SEAL] WM H. BRADLEY,
Clerk of Circuit Court U. S., Northern Dist. Illinois.

(Indorsed:) Supreme Court of the United States. Jesse Gunn vs. The Village of Evanston. Writ of error.

51 The United States of America to Jessie Gunn, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein the Village of Evanston is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

HENRY W. BLODGETT.

Witness the honorable judge of the northern dist. of Ill's this 21st day of January, A. D. 1876.

H. W. BLODGETT,
Judge.

Received a true copy of the above citation this 21st day of January, 1876.

S. SIBLEY,
Attorney for Jessie Gunn, Def't in Error.

(Indorsed :) Village of Evanston vs. Jessie Gunn. Citation.

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IN THE

United States Supreme Court,

OCTOBER TERM, A. D. 1878.

THE VILLAGE OF EVANSTON,
Plaintiff in Error,

vs.

JESSIE GUNN,
Defendant in Error.

Error to the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF FOR DEFENDANT IN ERROR.

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I.

The first error assigned, is the admission in evidence of the record of the United States Signal-Service at Chicago, showing the direction and velocity of the wind, the state of the weather, and that snow had fallen on the morning the plaintiff was injured.

The objections suggested by counsel for plaintiff in error, to the assumed want of that authentication or preliminary proof which precedes the introduction in evidence, of every record, or written document, cannot be fairly raised on the bill of exceptions before the Court.

This bill of exceptions does not purport to give the whole evidence on the subject. It describes the book as "the *record* kept by a person employed by the United "States Signal-Service at Chicago," and as showing certain facts which it states in substance. It does not purport to give a transcript of the book itself, or even of the particular entries admitted in evidence.

It was to the admission in evidence of this "*record*" that the defendant objected. This term "record," as here used, expresses more than a mere unauthenticated book, document, or memorandum, and was undoubtedly employed as implying that the necessary preliminary proof was either given to the Court and omitted from the bill of exceptions, or waived by the defendant.

A record is defined as "a written memorial made by a "public officer authorized by law to perform that function, "and intended to serve as evidence of something written, "said or done."

Bouvier's Law Dict., Tit., Record.

Again — the only objection made to the admission of the evidence was, that "there was no law authorizing such "*record* to be used in evidence, and because the same "was not competent testimony." This objection related solely to the competency of the evidence. All objections, for want of that preliminary proof which is addressed solely to the Court, were waived by it. The defendant cannot be heard in this Court to urge, under this general objection, other specific objections, which, if made at the time, could have been cured by the proper preliminary evidence, or which, for aught that appears, were in fact met by evidence before the Court, not embodied in the record.

In *Cliquot's Champagne*, 3 Wall., 139, objection was made in this Court, under a similar bill of exceptions, to the

admission in evidence of the statements of a person not a party to the suit. The Court say: "The bill of exceptions does not purport to set out all the evidence given in the case. Whether there was sufficient proof of the agency to warrant the admission of the acts and declarations of the agent in evidence was a preliminary question for the Court to determine. If the proof was insufficient, exception should have been taken on that ground, and the evidence on the subject, embodied in the bill. This was not done."

So in *Whitcher* v. *McLaughlin*, 115 Mass., 168, an entry in a church record was admitted, to show the date of a baptism. On appeal the Court say: "The preliminary facts which must have been shown to make the record entry evidence at all, such as that the book was regularly kept by the proper official, was in his handwriting, and came from the proper custody, it was the province of the Judge who presided at the trial to pass upon; and his decision is conclusive, unless it is brought up on exceptions which state the evidence upon which his finding is made."

In *Chicago and Alton R. R. Company* v. *Morgan*, 69 Ill., 492, it was held, that where an objection is made to the evidence generally, a particular objection to its admission, which might have been obviated by other proof, will not avail on appeal or error.

The evident purpose of the bill of exceptions was to present only the single question of law: Was the record in question, competent evidence?

As preliminary to this question, it is proper to consider the precise character of this evidence in the light of those facts which the Court knows judicially.

Section 221 of the U. S. Rev. Statutes, provides as follows: "The Secretary of War shall provide for taking meteorological observations at the military stations in

"the interior of the continent, and at other points in the "States and Territories, and for giving notice on Northern "lakes and sea coast by magnetic telegraph and marine "signals of the approach and force of storms."

Section 222 provides that "the Secretary of War shall "provide, in the system of observations and reports in "charge of the Chief Signal-Officer of the Army for such "stations, reports, and signals as may be found necessary "for the benefit of agriculture and commercial interests."

Congress has also supplemented this legislation by other acts in aid of the same general purpose, and by making liberal annual appropriations, for several years past, to promote the general system thus authorized and directed.

But the knowledge of the Court is not confined to public statutes, and the particular evidence in the case before it.

Facts of universal notoriety need not be proved. Courts will take notice of whatever is generally known within the limits of their jurisdiction.

Brown et al. v. *Piper*, 91 U. S., 42.

They will also judicially recognize the political constitution or frame of their own government, its essential political agents or public officers sharing in its regular administration, and its essential and regular political operations, powers and action.

1 Greenleaf Evid., Sec. 6.

If the memory of the Court is at fault, it may be refreshed by resorting to any means for that purpose, which the Court may deem safe and proper.

Brown et al. v. *Piper*, 91 U. S., 42.

1 Greenleaf Evid., Sec. 6 *a*.

Hence this Court has taken judicial notice of the ports and waters of the United States in which the tide ebbs

and flows, and the boundaries of the several States and judicial districts (*The Thomas Jefferson*, 10 Wheat., 428); the usual course of the great inland commerce by which the products of agriculture in the Valley of the Mississippi find their way to market (*Gibson* v. *Stevens*, 8 How., 184); the legal coins of the United States (*United States* v. *Burns*, 5 McLean, 23); treaties between the United States and foreign governments, and public acts and proclamations (*United States* v. *Reynes*, 9 How., 127); the manner in which bills for the incorporation of companies are prepared and passed (*Ohio L. & T. Co.* v. *Deboit*, 16 How., 435); and the manner in which corporations created in this country, have been in the practice of making contracts in England (*Bank of Augusta* v. *Earle*, 13 Peters, 519).

In the light of these principles, this Court has judicial knowledge of the extended system of Signal-Service which has been organized, and has been in operation for several years, and of the many facts which are known to every person, of ordinary intelligence, in the country with reference to it. This system has its regular stations of observation, located at points suited for the purpose, its corps of officers and employes, and the instruments and appliances necessary for regular and reliable observation, and annual appropriations are made by Congress for its support and promotion. It employs skilled and educated men, who must possess necessary educational qualifications, are placed under military discipline, and become a part of the general military service of the country. This service is, in fact, a recognized branch of one of the executive departments at Washington, acting under its orders, and as completely a part of the public service, as the different pension and land offices located through the country. It is a matter of common notoriety that this branch of the service has been engaged for years, in making and report-

by the proper authority to be kept, and that it be kept according to such directions.

1 Greenleaf on Evid., Sec. 496.

Nor is it necessary that it be kept by the officer himself, if it is under his control, and the entries are made by a person authorized to act for him.

Gault v. *Galway*, 4 Peters, 342.

The record in question is an essential part of the system authorized and directed by Congress. The series of observations intended, cannot be made, or at least preserved, so as to be of practical value, without such a record. It falls directly within the reasons governing the admission of official registers in evidence. The facts which it records were recorded for the benefit of the public. It was made by a person empowered to act in the public service, and under the direction of one of the executive departments of the government, and it can make no difference whether the entries themselves were made by the Secretary of War himself or his chief signal-officer, or by some other person in the public service, acting under their directions.

There are many familiar illustrations of the character of such evidence. Thus: parish registers, (*Lewis* v. *Marshall*, 5 Peters, 472, 479),—prison registers, (*Salte* v. *Thomas*, 3 B. & P., 188),—the register of vessels in the custom house, (*United States* v. *Johns*, 4 Dallas, 415),—the record of a land office, (*Gall* v. *Galloway*, 4 Peters, 332)—custom house registers, (*Tompkins* v. *Attorney General*, 1 Dow, 404),—and registers of voters (*Reed* v. *Lamb*, 6 H. & N., 75,) have all been held admissible as evidence of the facts which they record.

But there are numerous cases quite analogous to the case at bar.

In *Gault* v. *Galway*, 4 Peters, 331, the entries in the

record of a land office, were admitted in evidence The Court say : " As the records of this office are of great " importance to the country, and are kept under the offi-. " cial sanction of the Government, their contents must al- " ways be considered, and they are always received in " courts of justice, as evidence of the facts stated."

In *Merriam* v. *Mitchell*, 13 Maine, 439, the record kept at a local post-office, of mails received and sent, was admitted in evidence.

In *Gurney* v. *House*, 9 Gray, 404, a record kept of registered letters received at a post-office, was held admissible in evidence, without the testimony of the clerk who kept it.

In *De Armond* v. *Neasmith*, 32 Mich., 231, the Court admitted in evidence, a record of the weather, kept at the State Insane Asylum for a number of years, for the purpose of showing the temperature of the weather on a certain day included in such record.

So in the *Catharine Maria*, L. R., 1 Adm., and Ec. 53, the Court in a case of collision, admitted the books containing the entries made by the coast guard, and sent to the coast guard office, to prove the state of the wind and weather, at the time of the collision, without calling the person who made the entries.

The tendency of the modern authorities is to enlarge the rules of evidence by adapting them to new conditions and circumstances; and recent authorities have recognized another principle, under which the evidence in question was clearly competent.

In *Sisson* v. *Cleveland and Toledo R. R. Co.*, 14 Mich., 497, the Court admitted in evidence, for the purpose of showing the state of the market at a given time, the market reports in the newspapers of the date in question. The Court placed its decision on the ground that these

reports were made, and were acted upon by the commercial world, in the ordinary course of business, and were, in the nature of things, the best and most reliable evidence on the subject, citing: *Lush* v. *Druse*, 4 Wend., 317, and *Fennerstein's Champagne*, 3 Wall., 145. The Court (COOLEY J.,) say: "The principle which supports these "cases, will allow the market reports of such newspapers "as the commercial world rely upon, to be given in evi- "dence. As a matter of fact, such reports, which are "based on a general survey of the whole market, and are "constantly received and acted upon by dealers, are far more "satisfactory and reliable than individual entries, or indi- "vidual sales or enquiries, and courts would justly be the "subject of ridicule, if they should deliberately shut their "eyes to the sources of information which the rest of the "world relies upon, and demand evidence of a less certain "and satisfactory character."

It was upon the principle of this case, that the Court, in *De Armond* v. *Neasmith*, 32 Mich., 231, admitted in evidence the record, kept at the State Insane Asylum, for the purpose of showing the state of the weather on a given day.

The principle of these cases has been affirmed by this Court in two recent cases.

In *Cliquot's Champagne*, 3 Wall., 114, a price-current, obtained from dealers in the ordinary course of business, was offered in evidence, for the purpose of showing the market value of the articles mentioned in them. This evidence was objected to as hearsay. This Court held that it was competent evidence, citing *Lush* v. *Druse*, 4 Wend., 315. The Court say: "While Courts in the administration of the "law of evidence should be careful not to open the door "to falsehood, they should be equally careful not to shut "out truth. They should not encumber the law with "rules which will involve labor and expense to the parties,

"and delay the progress of the remedy—itself a serious "evil—without giving any additional safeguard to the in- "terests of justice. We think the price-current is not liable "to the objection that it was hearsay. It was prepared, "and used by the party who furnished it in the ordinary "course of his business."

In *Feurstein's Champagne*, 3 Wall., 144, letters by third parties abroad, to other third parties, offering to sell at certain rates, were offered in evidence to show the market value of an article of merchandise. They were objected to as hearsay, and *res inter alios acta*. The Court held the evidence proper. The Court after referring to the authorities say: "We think the letters in question in this "case were properly admitted. In reaching this conclu- "sion we do not go beyond the verge of the authorities to "which we have referred. In some of those cases the "person asserted to be necessary as a witness was dead. "But that can make no difference in the result. The rule "rests upon the consideration that the entry, other writing, "or parole declaration of the author, was within his ordina- "ry business. In most cases he must make the entry "contemporaneously with the occurrence to which it re- "lates. In all he has full knowledge, no motive to false- "hood, and there is the strongest improbability of untruth. "Safer sanctions rarely surround the testimony of a wit- "ness examined under oath. The rule is as firmly fixed "as the more general rule to which it is an exception. "Modern legislation has largely and wisely liberalized the "law of evidence."

The application of these principles to the case at bar is apparent. The entries admitted in evidence were made in the ordinary course of duty and with full knowledge of the facts to which they relate. They were made under circumstances the most favorable to accuracy and reliability. They were made when there was no temptation or occa-

sion for falsehood. They constitute evidence upon which science, commerce, and agriculture, are accustomed to act in their ordinary dealings.

Where evidence upon the point to which they relate is material, as it is conceded to have been in this case, evidence thus preserved and surrounded by all of these sanctions favorable to truth and accuracy, is palpably a better form of evidence, than that of witnesses testifying orally from such recollection as they would have on such a subject. The trial of this case occurred more than two years after the accident, and illustrates the delay which so often occurs before the event is investigated in Court. It is evident that, in such cases, this class of evidence is not only the best evidence, but must be, in many cases, the only reliable evidence, to establish such facts as the state of the weather, and the velocity, and direction of the wind, on a given day.

Instead of rejecting this species of evidence, the Courts should welcome it, as a new and reliable form of evidence upon a subject concerning which they have hitherto been without reliable evidence, and as a valuable aid to the attainment of truth.

II.

The second point, which is made the basis of several assignments of error, is, in substance, that the defendant, owing to its change in organization, was, at the time of the accident, under no obligation to keep the walk in question in repair, and that it cannot, therefore, be chargeable with negligence.

Evanston was incorporated as a town, December 29, 1863, under the law of March 3, 1845. (Rev. Statutes of 1845, Chap. 25, Title Corporations, Div. 1, Towns.)

This law authorized the corporation, among other things, "to keep open and in repair the streets and alleys "of such town, by making pavements or sidewalks as "to them may seem needful," and the levy and collection of a tax for the purpose. (Sec. 5.)

It also provided as follows:

"It shall be the duty of the said president and trustees, "to cause all the streets and alleys of such town, and all "the public roads passing from and through such town, "for one mile from the center thereof, to be kept in good "repair," etc. (Sec. 6.)

To enable the corporation to fulfill these duties, the law authorized it to require male residents to work on the roads, and appropriations to be made from the annual tax levy. (Sec. 6.) It also provided for a street commissioner, whose duties were to be defined by ordinance. An ordinance of the town defined these duties to be "to keep in "repair streets, ditches, drains, crosswalks, and sidewalks "under the direction of the Board of Trustees."

The law under which the new organization was effected conferred the following, among other powers:

"To lay out, establish, open, alter, widen, extend, grade, "pave, or otherwise improve, streets, alleys, avenues, side-"walks, wharves, parks, and public grounds, and vacate "the same, to prevent and remove encroachments or ob-"structions upon the same, to construct and keep in repair "culverts, drains, sewers and cesspools, and to regulate "the use thereof, to construct and keep in repair bridges, "viaducts and tunnels, and to regulate the use thereof." (Rev. Stats. Ills., Ch. 24, Art. 5, Sec. 1.)

The law also authorized the assessment and levy of taxes for "corporate purposes" (Art. 8, Sec. 1); the making of annual appropriations "to defray all necessary ex-"penses and liabilities" (Art. 7, Sec. 2); and the borrowing

of money under certain contingencies for the same general purposes (Art. 7, Sec. 3).

That it was the duty of the corporation, clothed with such ample powers, whether acting under the old or the new law, to keep its streets in repair, and that it was liable for any damage resulting from the neglect of this duty, is too well settled to require more than a statement of the proposition.

Browning v. *City of Springfield*, 17 Ills. 143.
Town of Waltham v. *Kemper*, 55 Ills., 349.
Nebraska City v. *Campbell*, 2 Black, 592.

But the position is taken by counsel for plaintiff in error, that during the interval between the date of the new organization, October 15, 1872, and the date when the corporation was authorized to make its first appropriation under the new law, April 15, 1873, it had no power to make contracts or incur liability, and, as a consequence, no power to keep its streets in repair, or, in fact, to perform any duties which would involve expense or liability, and was, in short, without powers to exercise, or duties to perform. (Brief, pp. 27–34.)

If this remarkable result followed the change of organization, then there is a grave defect in the frame of the law under which it was effected. But it will be seen from an examination of this law, that no such result was intended. On the contrary, careful provision is made, to preserve the identity of the corporation, and against any impairment of its powers by the change.

The law is a general law, and provides, among other things, that "any town in this State," incorporated under a general or special law, "may become *organized* as a "village, under this act" (Art. 11, Sec. 1), and for holding

an election to determine whether such "village organiza-
"tion" shall be adopted.

Article 11, Sec. 4, provides: "If a majority of the
"votes cast at such election are for village organization
"under the general law, such town shall, from and hence-
"forth, be deemed to be duly incorporated as a village
"under this act; but *the town officers then in office shall*
"*continue as like officers of such village until their suc-*
"*cessors shall be elected or appointed under the provisions*
"*of this act.*"

Section 13 of the same article provides that the election for village officers shall be held on the 3d Tuesday in April of each year; and as the change in organization was made in October, 1872, the old officers of the town continued in office, under the provisions of Section 4, until the April following.

By Article 1, Sec. 6, it is provided that "from the
"time of such change of organization, the provisions of
"this act shall be applicable to such cities and villages,
"and all laws in conflict therewith shall no longer be
"applicable. *But all laws or parts of laws, not inconsistent*
"*with the provisions of this Act, shall continue in force and*
"*applicable to any such city or village, the same as if such*
"*change of organization had not taken place.*"

By Section 11, it is provided: "All ordinances, resolu-
"tions and by-laws in force in any city or town when it
"shall organize under this Act, *shall continue in full force*
"*and effect until repealed or amended, notwithstanding such*
"*change of organization; and the making of such change*
"*of organization shall not be construed to effect a change in*
"*the legal identity, as a corporation, of such city or town.*"

Section 12 provides: "All rights and property of every
"kind and description, which were vested in any municipal
"corporation under its former organization, *shall be deemed*

" *and held to be vested in the same municipal corporation upon*
" *its becoming incorporated under the provisions of this Act;*
" *but no rights or liabilities, either in favor of, or against*
" *such corporation, existing at the time of so becoming in-*
" *corporated under this Act, and no suit or prosecution of*
" *any kind, shall be affected by such change.*"

We have then this result: This corporation having authority and means to repair side-walks, with an officer appointed for that purpose, changed its organization under the provisions of a general law, from that of a town to that of a village. By that law, ample power and authority over the same subject was given to it, and all provisions of the former law, not inconsistent with it, were preserved. All its old ordinances were continued in force, and it was specially provided that its legal identity, as a corporation, should not be affected by the change. The old officers were continued in office until the regular annual election under the new law. Its property, rights, and liabilities remained the same. The corporators were the same, and there was no change in its territorial limits.

There was a change only of name and organization. Holding and using as it did, all the property and resources which it had acquired under its old organization, it cannot be heard to say that by this change it was relieved from one of its ordinary and essential duties as a municipal corporation.

Even in the absence of such explicit provisions of the statute itself, the Courts would refuse to give so unjust and absurd an effect to this change in organization.

In *City of Olney* v. *Harvey*, 50 Ill., 453, the Town of Olney became incorporated as a City. The enforcement of an obligation of the new organization was resisted on a ground similar to that urged in this case. The Court say: " The municipal corporation that incurred the debt now

" sought to be recovered, still remains a municipal corpor-
" ation, and to hold that it can set its creditors at defiance,
" by procuring the Legislature to call it a city instead of a
" town, and its officers, mayor and aldermen, instead of
" president and trustees, would be such a burlesque upon
" justice that the proposition needs but to be stated to be
" rejected."

The effect of such a change in organizations is stated by this Court in *Broughton* v. *Pensacola*, 93 U. S., 270. The Court say: " When a new form is given to an old
" municipal corporation, or such a corporation is re-organ-
" ized under a new charter, taking in its new organization
" the place of the old one, embracing substantially the same
" corporators and the same territory, it will be presumed
" that the Legislature intended a continued existence of
" the same corporation, although different powers are
" possessed under the new charter, and different officers
" administer its affairs."

But there is another fallacy in the argument of counsel on this branch of the case. The position is that the corporation had not yet made an appropriation for the purpose, and therefore had not the means and consequent power to make the needed repairs. But it was not the appropriation for the coming year which would have given the corporation the means—but the existing appropriation upon which revenue had been or was being received.

The only evidence in the record is that no appropriation had been made under " said law," viz., the new law (Rec., p. 14). It does not follow that the corporation had not ample means for the purpose—derived from taxes levied or collected under its former organization. On the contrary, it was its duty to make provision on the subject, and it is a fair presumption that it either had in its hands or in process of collection at the time of the change abundant

revenue to enable it to fulfill this most important and essential duty.

III.

The next question is: Assuming that the change in organization did not affect the liability, was it the duty of this corporation to keep the sidewalk in question in repair?

The evidence shows that the original ditch was dug by the drainage commissioners in the year 1855, and several years prior to the incorporation of the town of Evanston.

The town was incorporated in December, 1863, with full power to keep all street, alleys, and public roads within the town in good repair, and a street commissioner was provided for that purpose. Under this power the town adopted an ordinance defining the duty of the street commissioner to be "to keep in repair streets, ditches, drains, "crosswalks and sidewalks, under the order and direction "of the Board of Trustees." The evidence shows that the town, by recorded resolutions, authorized the street commissioner to deepen this ditch, and side it up with planks, within the corporate limits, and had done so, and that sidewalks and crossings on the streets crossing the ditch had been constructed so as to pass over it, under the authority of the trustees. (Rec., p. 13.) Along Sherman avenue, in which this drain was laid, there was no sidewalk for foot passengers. The avenue was about 100 feet wide, and at the distance of 20 feet from its west line was this drain, running north and south through the entire limits of the village for some distance, until it empties into Lake Michigan. In front of the block in which the accident occurred this drain was covered over with planking laid lengthwise over cross-pieces resting upon a plank side of the drain. This covering was put in by individuals owning property

on the block, in the summer of the year 1871, for a sidewalk as well as to cover the drain, and had since then been used as a sidewalk by people living or passing in that locality. (Rec., p. 11.) When this drain cover was built the town authorities were aware of and assented to its erection, and did not interfere to prevent it, but assisted in places, causing crossings for the streets and for the alleys running through the block to be built over the drain at the expense of the town. (Rec., p. 13.) The street commissioner acting at the time the planking was done was aware of the fact that the lot owners doing the same expected it to be used as a walk, and did the planking at the public expense at the intersection of streets and alleys. (Rec., p. 14.) The walk was constructed in the summer of 1871, and the accident occurred in April, 1873. During all of this time this sidewalk was in use, as the only walk by the people living or passing in that locality.

The duty of the corporation, under these facts, seems clear.

The general doctrine of the duty of a municipal corporation to keep its streets in repair, and the consequent liability for injuries resulting from a neglect of that duty has been repeatedly affirmed by this Court.

Nebraska City v. *Campbell*, 2 Black., 590.
Wightman v. *Washington*, 1 Black., 52.
Mayor v. *Sheffield*, 4 Wall., 194.

It is immaterial by whom the original ditch was dug, or sidewalk built.

The walk was in a public street, and its construction for the purpose of a sidewalk, with the consent of the corporation, and its continuous use by the public as such, alone establish the duty and consequent liability.

City of Chicago v. *Gallagher*, 44 Ill., 296.
City of Lacon v. *Page*, 48 Ill., 500.

City of Champaign v. *Patterson*, 50 Ill., 62.
City of Bloomington v. *Bay*, 42 Ill., 505.
Stark v. *Lancaster*, 57 N. H., 90.
Whitney v. *Essex*, 42 Vt., 526.
Hall v. *Unity*, 57 Maine, 532.
Norristown v. *Moyer*, 67 P. St., 367.
Mayor v. *Sheffield*, 4 Wall., 194.

In *City of Bloomington* v. *Bay*, 42 Ill., 503, it was insisted that there was no proof that the city built or had ever repaired the sidewalk, and that for that reason the city was not liable.

The Court say: "The authorities cannot relieve themselves from their just liability by casting the burden of "constructing sidewalks on the lot owners; and if they "construct the sidewalks by the command or order of the "city authorities, or without it, the authorities are bound "to keep such sidewalks in repair. * * * *

"In this case, if the sidewalk was originally built by "the lot owner, the exclusive supervision being in the city "authorities, they must see to the repairs and to its safety, "and if an injury results from defects which they should "have repaired, they must be liable."

In *City of Champaign* v. *Patterson*, 50 Ill., 62, plaintiff was injured by falling into a hole in the plank covering of a drain which was used as a sidewalk, as in the case at bar. The city was held liable. The court say:

"The defendant in error had a right to use this side-"walk and the usual crossing, though it was the covering "of a drain, if the inhabitants of the city and others used "it for a crossing."

While the evidence shows that the original drain was dug by the drainage commissioners long before the incoration of the defendant, it does not appear that they exercised any control over it after that time. On the con-

trary, it does appear that the defendant was intrusted with the care of the street by its charter, and repeatedly recognized and assumed jurisdiction over it.

But a municipal corporation is not relieved from responsibility for the want of repair of a street within its jurisdiction, by the fact that there may be a duty imposed by law on some other person or corporation to keep it in repair.

Welcome v. *Leads*, 51 Main 313.
Batty v. *Duxbury*, 24 Vt., 163.
Norristown v. *Moyer*, 67 P. St., 367.

IV.

Was the defendant negligent?

The evidence showed that the hole which caused the accident was some six or eight inches wide, and from two to four feet long, and had been made in the fall of 1872. It had been insufficiently covered by the lot owner, but had been broken again, and remained unrepaired some weeks prior and down to the time of the accident. The lot owner had notified the ex-street commissioner of it, supposing he was still street commissioner, and the town and village officers were only two or three blocks off. (Rec., p. 12.)

Applying the principles to which we have referred to these facts, the negligence of the defendant was clearly established.

There was a dangerous defect apparent and notorious, of which the corporation had notice, or was bound to take notice.

If a corporation has notice of the defect, it is liable for all accidents which may occur by reason of the defect after such notice.

Wharton on Negligence, Sec. 963.

It is not necessary to prove express notice; lapse of time, or the notoriety of the defect, supplies such notice, and after a reasonable time has elapsed it is negligence on the part of the corporation not to know of the defect.

Wharton on Negligence, Sec. 963.
Requa v. *City of Rochester*, 45 N. Y., 129.
Mayor v. *Sheffield*, 4 Wall., 189.
Chicago v. *Robbins*, 2 Black, 418.

The question of the defendant's negligence was peculiarly a question of fact for the jury, under all the circumstances of the case, and was fairly submitted to them by the court.

V.

Was the plaintiff guilty of contributory negligence?

The question of the plaintiff's negligence is also peculiarly a question of fact for the jury, and was fairly submitted to them by the court.

The court instructed the jury as follows: "If you find, "from the evidence, that the accident to the plaintiff "occurred by reason of her own neglect, or want of due "care, then the defendant is not liable. What is negli- "gence is a question of fact to be decided by the jury "under the circumstances of the case, as shown in the "proofs." (Rec., p. 16.) And again: "The plaintiff "admits that she knew there was a hole, and knowing "that fact she was bound to use due caution to avoid it." (Rec., p. 17.) The court also called the attention of the jury fully to the circumstances which it is claimed tended to show neglect on the part of the plaintiff, and no complaint is made of the incorrectness of the charge in that respect.

The only error assigned on this branch of the case is the

refusal of the following instruction, asked by the defendant: "It must be proven to the jury that the plaintiff at "the time of receiving her injuries was exercising reason- "able care, and such as was suited to the nature of the "case, to avoid falling into the hole in the drain cover in "question. Even though negli ence on the part of the "defendant be made out, yet if the evidence shows that "the plaintiff knew of the defect in question, and went in "its proximity, knowing also that there was a drain be- "neath, and thereby exposed herself to danger, the plain- "tiff by thus exposing herself to danger contributed to "the injury, and under such circumstances cannot claim a "right to recover of the defendant." (Rec., p. 20.)

It is conceded that the first branch of this instruction is fully covered by the charge of the court, but it is claimed that the last clause should have been given. This clause, in effect, asserts that if the defendant in error knew of this defect, and notwithstanding this knowledge went in its proximity, she was guilty of contributory negligence, and should not recover. That she did know of it, and that she did go in its proximity, was admitted by herself, and the instruction was therefore virtually, that as a matter of law she was not entitled to recover.

The law is well settled, that the mere knowledge of a defect in a highway does not preclude the plaintiff from recovering for an injury caused by such defect.

Weare v. *Fitchburg*, 110 Mass., 339.
West v. *Lynne*, 110 Mass., 518.
Mahoney v. *Metropolitan R. R. Co.*, 104 Mass., 73.
Dowd v. *Chicopee*, 116 Mass., 93.
Kenworty v. *Town of Ironton*, 41 Wis., 654.
Wharton on Negligence, Sec. 997.

It is in such a case still a question of fact whether under all the circumstances, and notwithstanding such knowl-

edge, the person injured has exercised due and proper care.

Id.

In *Weare* v. *Fitchburg*, 110 Mass., 334–339, plaintiff was injured by falling over a stone on the sidewalk which had been there for some months, and of the existence of which she knew. The court say: "We cannot say, as a matter "of law, that this shows conclusively that she was careless, "or that there is no evidence tending to show the contrary. "Previous knowledge of the existence of the defect, and "a residence in its immediate neighborhood, are not con- "clusive against her. It is for the jury to determine in "view of all the circumstances whether the care and cir- "cumspection used in any given case was such as ought "reasonably to have been exercised by the traveler."

In *Mahony* v. *Metropolitan R. R. Co.*, 104 Mass., 75, the court say: "A person who in the lawful use of a "highway meets with an obstacle, may yet proceed, if it "is consistent with reasonable care so to do; and this is "generally a question for the jury, depending upon the "nature of the obstruction, and all the circumstances sur- "rounding the party. In the case at bar, if the plaintiff "had reasonable cause to believe that he could pass the "obstruction in safety, and used reasonable care in the "attempt, he is entitled to recover."

In *Kenworty* v. *Town of Ironton*, 41 Wis., 654, a similar instruction to the one in question was refused. The court say: "This was properly refused, for the proposition is, "in effect, that a traveler who knowingly passes over a "dangerous place in the highway, is necessarily guilty of "negligence. Such is not the law."

The instruction asked was therefore properly refused, and the general question of plaintiff's care having been fairly submitted by the charge of the court, was settled by the verdict of the jury.

The very circumstance which is referred to as evidence of negligence on the plaintiff's part, that she knew of the defect, that it occurred to her and was present in her mind that she knew where it was, and stepped, as she thought, away from the hole, and while trying to avoid, stepped into it (Rec., p. 12), might well have been considered by the jury as evidence of thoughtfulness and care on the part of the plaintiff.

It is also argued at length that it was the duty of the plaintiff, knowing of this defect in the ordinary traveled way, to take some other route, and that because of her failure to do so, she was not entitled to recover.

No instruction was asked upon this point, and we are unable to discover any error assigned which presents it.

But the position is not well taken

It is claimed that the defendant could have avoided the accident by passing along the space between the park and the lots adjoining the street.

The question is whether, as a matter of law, she was bound to do this, and whether her failure to do so was such conclusive evidence of negligence as will prevent a recovery.

If, under the circumstances of the case, there is any possible question of fact whether ordinary prudence and care required her to do this or not, the verdict of the jury has conclusively settled that question, and their finding cannot be reviewed.

The traveler on a highway is not bound, because there is a known defect, to take some other road. He may pass over the usual road, and if the accident occurs to him while he is exercising due care and caution to avoid the danger, he is entitled to recover, and it is no defense that

he might have avoided the accident by taking another route.

Wharton on Negligence, Secs. 997 and 66.
State v. *Fryeburg*, 15 Me., 405.
Erie v. *Schumgle*, 22 Pa. St., 384.
Mahony v. *Met. R. R. Co.*, 104 Mass., 75.

In the case at bar the evidence shows that the sidewalk in which the defect existed, was constructed,and used for a sidewalk, and was the only walk in use. It was the ordinary and usual traveled way for foot passengers. The defect was one which could be avoided under ordinary circumstances, and the evidence shows that the plaintiff herself had repeatedly and daily for several months previous passed it without accident.

The space between the park and the lots adjoining the street, was rough and unimproved and had never been used as a foot way. There was a regular walk leading down from the house where the plaintiff resided across this space to the sidewalk beyond.

As to whether the plaintiff could have avoided the hole by the exercise of due care, and as to how near and where it was prudent for her to walk under the circumstances, and whether she exercised due care and caution in coming to the conclusion, as she did, that it was not necessary for her to step off the sidewalk, were questions of fact for the jury to pass upon.

The bill of exceptions does not purport to give the details of the evidence, and the unreliability of any argument in this Court on the facts—is illustrated by the assumption of counsel that the hole which caused the accident ran lengthwise of, instead of across the walk.

This the bill of exceptions does not show, and it will be seen by reference to the charge of the Court that it was

not upon this theory that the case was submitted to the jury. (Rep., p. 17.)

While many of the leading facts of this case were undisputed—the determination of the question of negligence involved a variety of deductions, and inferences which fell within the peculiar province of the jury.

What is ordinary care, even though the facts are undisputed, is peculiarly a question of fact to be determined by the jury under proper instructions. It is the judgment and experience of the jury, and not of the judge, which is to be applied to the facts.

The true rule in this class of cases, and the reasons for it, are stated in *R. R. Company* v. *Stout*, 17 Wall., 66. In that case the court say in conclusion:

"It is assumed that twelve men know more of the com-
"mon affairs of life than does one man; that they can
"draw wiser and safer conclusions from admitted facts
"then occurring than can a single judge.

"In no class of cases can this practical experience
"be more wisely applied than in that we are considering.
"We find accordingly, although not uniform or harmoni-
"ous, that the authorities justify us in holding in the case
"before us, that although the facts are undisputed, it is for
"the jury, and not for the judge, to determine whether
"proper care was given, or whether they established
"negligence."

There is no analogy between the case at bar and the cases cited for plaintiff in error. In all of that class of cases it will be found that the person injured has knowingly placed himself in a position of admitted danger, and the accident has been the result of such willful act of exposure. This class of cases is well illustrated by the case of *Baltimore and Potomac Railroad Co.* v. *Jones*, 95 U. S., 441, in which plaintiff was knowingly and unnecessarily

riding upon the pilot of a locomotive — there was ample room for him in the box-car attached to the train; he had been warned of the danger of riding on the pilot, and forbidden to do so on former occasions; if he had ridden in the box-car, where he could and ought to have ridden, the accident would not have occurred.

WIRT DEXTER,
Attorney for Defendant in Error.

IN THE

United States Supreme Court.

OCTOBER TERM, A. D. 1878.

THE VILLAGE OF EVANSTON, *Plaintiff in Error,*

vs.

JESSIE GUNN, *Defendant in Error.*

Brief and Abstract for Plaintiff in Error.

GEORGE O. IDE,
ATTORNEY FOR PLAINTIFF IN ERROR.

CHICAGO:
BULLETIN PRINTING COMPANY, 113 MADISON STREET.
1878.

United States Supreme Court.

OCTOBER TERM, A. D. 1878.

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v.

JESSIE GUNN,
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ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

ABSTRACT.

May it please the Court:

This is a case at law, brought up by writ of error to the Circuit court for the Northern District of Illinois. In that court, the defendant in error recovered damages of the plaintiff in error to the amount of $6,500, for personal injuries, alleged to have resulted to her from the negligence of the corporation in not taking proper care of a sidewalk in one of its streets. The plaintiff in error seeks a reversal of the judgment and a new trial, on the ground that the Circuit court erred, to the injury of the plaintiff in error, in its

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rulings in admitting certain evidence and in its charge to the jury, as hereinafter more particularly specified.

The action was in *case*, and the declaration filed therein alleged, in substance: in the first count (Printed Record, folio 5), that the Village of Evanston was a municipal corporation created under the laws of the State of Illinois; that on April 30th, 1873, said village controlled a public sidewalk in one of its streets, called Sherman avenue, which it was its duty to keep in safe repair and condition; that it negligently suffered the sidewalk to be in an unsafe condition, with divers planks, wherewith the sidewalk was laid, broken, and leaving a hole through the sidewalk, under which the village had excavated or continued a deep ditch; by means of which the plaintiff, who was then and there passing along the sidewalk, unavoidably tripped and stumbled against a broken plank and stepped into said hole, and was thereby thrown down and sustained thereby injuries to her right thigh and thigh bone, which have since permanently lamed her and caused her to be diseased. (Record, folio 6.)

The second count alleged, that in the year 1873 the defendant was a city, and that it was its duty to keep its streets and sidewalks in safe condition, but that the city not regarding such duty suffered a sidewalk on Sherman avenue within its limits to be in bad condition, with planks broken and unfastened over a ditch for street drainage, so that there was a vacant space of four feet from the sidewalk to the ground beneath it; that the city suffered the sidewalk to so remain for four months prior to the plaintiff's injury; that the city had been previously notified through its officers of

the defective sidewalk and neglected to repair the same; that on the 30th day of April, 1873, the plaintiff while walking on the sidewalk with all proper care and caution unavoidably stepped through a hole in the sidewalk and received such injuries thereby that in January, 1874 she became afflicted with a hip disease and incapacitated from pursuing her business of school teaching; also, that the city of Evanston abandoned its special city charter and became incorporated as a village under the general law of Illinois, and that defendant thus assumed the liabilities of its predecessor, the city. (Record, folios 7, 8, 9.)

A third or additional count (Record, folio 14) alleged that the defendant was on April 24th, 1873, a municipal corporation under the laws of Illinois, and had the power and was in duty bound to keep in safe condition and repair, its streets, walks, drains, sewers, and culverts, so that said streets should at all times be passable and safe for the passage of persons; but that the defendant not regarding its duty suffered Sherman avenue, one of its streets, to be and remain in bad repair and unsafe condition in this respect. That it authorized, directed, continued and suffered a drain along the westerly side of said street, which drain was about five feet wide and five feet deep, to be covered with planks for a distance of about 600 feet along the street and to be used by footmen for a walk for that distance on the westerly side of said street; that the said plank covering of the drain was the only walk constructed on that side, in that locality, and was generally used for a sidewalk; that this plank covering was imperfect and insufficient, and at said date a plank thereof was

broken and displaced, leaving a hole through the covering several feet long and about six inches wide; that the defendant and the town of Evanston (to whose rights and liabilities the defendant succeeded) had suffered said covering to remain in such unsafe condition for a long time prior to said day, and though notified thereof it had wholly neglected to repair said covering and make said street safe for persons to pass along the same; and that by reason of this drain and its broken covering, the plaintiff who was on said day passing along over the covered drain with all proper care and caution fell through the broken covering and received the injuries complained of. (Folio 16.)

The general issue and the Illinois statute of limitations were pleaded to this declaration. (Record, pp. 4, 5, 7 and 8.) On December 14th, 1875, a trial of the case was had before the court and a jury, resulting in a verdict for the plaintiff. (Rec., folios 18–20.) The defendant moved for a new trial, which motion was overruled and a judgment was entered by the court on the verdict. (Rec., folios 21–22.) A bill of exceptions was allowed and filed, showing the evidence adduced and the exceptions taken by the plaintiff in error upon the trial. (Rec., folio 25.)

From this bill of exceptions the following appear to be the facts in the case:

1. That the old Town of Evanston, located about ten miles north of Chicago, was incorporated under the general law of Illinois of 1845, in the year 1863, and that the plaintiff in error, its successor, became incorporated as a municipal corporation under the name of the Village of

Evanston, by a vote of its citizens on October 15th, 1872, under the provisions of the general law of Illinois, entitled "An act to provide for the incorporation of cities and villages," approved April 10th, 1872. (Rev. Statutes of Illinois, 1874, page 211; Rec, folio 30.)

2. That the plaintiff in the suit received her alleged injuries on the morning of the 22d day of April, 1873, by falling through the broken cover of a drain, located on the west side of Sherman avenue in said village. (Rec., folio 27.)

3. That this drain was not dug by the village nor by its predecessor the town, but was originally dug in the year 1855, long before the incorporation of the old town, through lands now embraced within the corporate limits of the village and including what is now called Sherman avenue, by certain drainage commissioners who were incorporated as a distinct corporation, with succession, by the legislature of Illinois, under a law in force February 15th, 1855, and were empowered by this law to dig this drain, and to keep it in repair. (Record, folio 32.)

4. That after the ditch had been dug and put into operation by these drainage commissioners, and after the organization of the old town, the street commissioner of the latter, by authority of its trustees, had in places where the ditch ran through the town deepened the ditch and sided it up with planks, and had constructed street crossings on streets crossing the ditch, so as to pass over the ditch (Record, folio 31); that in the year 1871 private individuals, owning property adjacent to the *locus in quo* of the alleged injury, had covered with planks that part of the drain, for

about a block, which lay on the west side of Sherman avenue between two parallel streets, running east and west and called Church and Clark streets, leaving the drain open on top north of Clark street and south of Church street; that since then people, passing in that locality on the west side of Sherman avenue between Church and Clark streets, had used the drain cover as a sidewalk, there being no other laid at that time on the west side of the street in the space reserved for sidewalks (Rec., folio 26); that when these lot owners built this drain cover, the authorities of the old town were aware of and did not prevent its erection, but assisted in places in causing to be built over the drain at the town's expense crossings for the street north and the street south of this block running east and west, and for an alley running through the block to the drain (Rec., folio 29); but it was also proven that the Board of Trustees of the old town had never by any recorded proceedings authorized the drain to be covered over, and that neither the trustees of said town nor those of the defendant had ever authorized by vote or recorded proceeding any sidewalk to be laid on the top of said drain, and that no street commissioner had ever consented by any direct act that the cover of the drain should be built or used for the purposes of a sidewalk (Rec., folio 33).

5. That the plaintiff in the suit was a school teacher, a strong, healthy woman, 21 years old (Rec., folios 25–27); and was living, in April, 1873, at the time of the injury and for some time previous, at a house located on the west side of Sherman avenue between said Church and Clark streets, and near the locality where the injury was alleged to have

occurred; that Sherman avenue was 100 feet wide, and in it, at a distance of 20 feet or more from the west line of the avenue, the drain ran north and south through the village, but was covered over, as above mentioned, with planks two inches thick, laid lengthwise over cross pieces, between Church and Clark streets, in front of said house and the block in which it was situated; that people living or passing in that locality used this drain cover as a sidewalk; that a narrow plank walk led from the gate of the house where plaintiff lived to the covered drain, and that it was the plaintiff's custom to pass to and over the covered drain and to use it as a sidewalk, there being no regular sidewalk constructed in the space allotted for sidewalks in front of said house and the other premises lying north to the next street, meaning said Clark street (Rec., folio 26); that the space between the fence of this house and the drain was thirty feet and five inches wide, and was occupied, next to the drain, by a park for trees about fifteen or more feet wide, and between the park and the fence by a passage way left for a sidewalk in the usual place of the uniform width of six feet, running north from the gate of the fence to the sidewalk on the next street north, on which street west plaintiff's school house was situated, and that by passing along this passage way the plaintiff could have avoided the proximity of the hole in the drain cover; that the ground in this passage way, though rough and not improved as a foot-walk, was of hard, dry sod, and there was no obstacle there at the time of the accident to prevent a person from going along this passage way from the house to the sidewalk on the street north on the way to the school; also that the park on the side nearest the drain

cover was protected by a railing, and that, as the plaintiff herself testified, if she had, on the occasion of the accident, chosen to walk on the ground between this railing and the drain cover, instead of on the drain, she would have avoided the hole, but that she did not at the time think it was necessary to do so. (Rec., folios 28–33).

Actual measurements, made, showed that the cover of the ditch was six feet and five inches wide; that the distance from the west line, or side nearest the park, of the drain-cover to the railing of the park was three feet; that the passage way, left for a sidewalk, between the park and the house-fence was nine feet wide; that the hole in the covered drain through which the plaintiff claimed her leg to have fallen was six inches from the east side of the covered drain; that the drain cover or walk over the ditch was six feet and five inches wide, and the distance from the top of the cover to the water or bottom below was four feet (Rec., folio 33); that this hole in the cover was six or eight inches wide, and some two to four feet long (folio 26), lay east of the centre of the drain, and a few feet to the north of the plank walk leading down from the house-fence through the sidewalk space and the park to the drain (folio 28), and was accidentally made in the fall of 1872 by a runaway team crushing and breaking out the end of a board; that the hole had been insufficiently covered by the lot owner but had been broken in again, and remained unrepaired for some weeks prior and down to the time the plaintiff fell into it; and that the only actual notice professed to have been given was, that the lot owner had notified a former street commissioner of it, supposing he was in office yet, when in fact he was not (folio 26).

6. As to the time when, and the manner in which the plaintiff below was injured, the proofs show that on the morning of the 22d of April, 1873, the plaintiff while on her way to her school and while passing along over the drain cover fell into this hole with her right leg, whereby she sustained a severe wrench of the back and hip joint, which caused her severe pain and fainting at the time and from the effects of which she subsequently experienced much suffering and inconvenience, gradually increasing to such an extent that in April 1875 she was compelled to cease school teaching and resort to medical treatment (folio 27).

7. The evidence also shows that the plaintiff knew of the existence of this hole in the walk and its locality, for a period of about four months or more prior to the injury, and had been in the habit of passing by it daily on her way to and from school at least four times a day, and had always theretofore passed it safely and without difficulty; but that on the morning of the accident and in the evening before snow had fallen and covered the hole over so that it was not visible to her on that morning; that it occurred to her, and it was present in her mind (as the plaintiff herself testified), that there was a hole in the walk, and that as she stepped from the walk leading from the house to the covered drain, she thought of the hole, and thought she knew where it was, and stepped as she thought away from the hole and while trying to avoid it stepped into it; that she had never had any trouble before in passing it, and could have seen it then but for the snow—(folios 27 and 28); that (as she testified), if she had on this occasion chosen to walk on the ground between the park rail-

ing and the drain cover instead of on the drain, she would have avoided the hole, but that she did not at the time think it was necessary to do so (folio 28, parg. 5); also that if the plaintiff had on this occasion gone along the open passage way left for a sidewalk, she would have avoided the proximity of the hole. (Folio 28.)

8. It was also proven, that from the time of the organization of the Village of Evanston on October 15th, 1872, under the general act of the legislature of Illinois, approved April 10th, 1872, in force July 1, 1872, above mentioned, up to the month of June, 1873, no appropriations under said law had been made by said Village, and that the first appropriation ordinance under said law made by said Village was adopted in June, 1873. (Rec., folio 32.)

The object of this latter proof may be better understood by reference to certain provisions of that law, which limit and restrict the village authorities in the exercise of their corporate powers particularly as to the time and mode of raising money by taxation and disbursing it for corporate purposes.

Sec. 4, Art. 7, of that act (Sec. 91, Ill. Rev. Stat. 1874, p. 227), says, that "No contract shall be hereafter made by the board of trustees or any committee or member thereof, and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the board of trustees or not, unless an appropriation shall have been previously made covering such expense, except as herein otherwise expressly provided." This exception relates to the provision in section 90, concerning the payment of judgments and ordering of an im-

provement, the necessity of which is caused by any casualty or accident happening after the annual appropriation is made.

Section 89 of the same article provides, that the appropriations necessary to defray the expenses and liabilities of the corporation shall be made in the shape of an annual appropriation bill or ordinance, which shall be adopted by the trustees within the first quarter of the fiscal year; but by sec. 64, p. 223 R. S., the ordinance cannot take effect until the expiration of ten days after its publication in a newspaper published in the village, or after posting if there is no newspaper. The fiscal year begins at the date of the annual election of officers, which by sec. 190, article XI. Rev. Stat. p. 243, is fixed to be held on the third Tuesday in April in each year. So that by this law, the first quarter of the fiscal year begins on the third Tuesday in April and ends on the same day in July. Section 89 of article 7 provides that no further appropriations shall be made at any other time in the year without a vote of the people. And section 90 provides that the board of trustees shall not, nor shall any officer of the corporation add to the expenditures in any year, anything over and above the amount provided for in the annual appropriation bill passed in the first quarter of the fiscal year, with the exceptions aforesaid of paying judgments and providing for causalties happening after the passage of the annual appropriation. (Rev. Stat. Ill., p. 227.)

The above summary of the evidence comprises the material facts of the case, excepting the testimony of the medical men, which relates to the nature and extent of the plaintiff's injuries and disease.

The plaintiff in error on the trial below claimed it was not liable: first, on the ground that, at the time of the alleged injury and under the limitations of its charter and the circumstances of the case, it had not the legal power and ability under its charter to raise and expend money in the care of its streets until the first quarter of the fiscal year of 1873 had arrived and time had been given it to pass and publish an annual appropriation ordinance, which time could not be until after the date of the plaintiff's injury; and that therefore, it had not been guilty of any breach of duty in the premises; and, second, that even if the corporation was guilty of such breach of duty, yet the evidence, and particularly that of the plaintiff herself, showed that she had not on the occasion of the alleged injury exercised that care and caution which her previous knowledge of the defect in the drain and the circumstances demanded of her, and that by knowingly going in proximity of the broken board in the drain-cover she exposed herself to danger and thus contributed to the injury, and under the law of contributory negligence had no legal right to recover damages of the corporation.

These points were presented on the trial in the shape of specific requests or instructions, which the court refused to give, and also by exceptions to those portions of the charge, given by the court to the jury, which ignored or denied these propositions.

ASSIGNMENT OF ERRORS.

In the Supreme Court of the United States, October Term, A. D. 1878.

VILLAGE OF EVANSTON,
vs.
JESSIE GUNN.

In error to the Circuit Court of the United States for the Northern District of Illinois.

And now comes the said plaintiff in error, by George O. Ide, its attorney, and says that in the record, proceedings and judgment aforesaid, there is manifest error in this, to wit:

1. That the Circuit court erred in permitting to be read to the jury, against defendant's objections, portions of a record, which had been kept at Chicago by a person employed by the so-called United States Signal Service, "showing that a snow storm occurred on the evening of April 21st, 1873, and continued until the morning of the next day, and that the wind blew at the rate of 20 miles an hour on the night of the 21st of April, and that snow fell at that time sufficient to make .17 of an inch when melted." (Record p. 14, folio 32;) to which evidence the defendant objected and excepted, because there was no law authorizing such record to be used

in evidence, and because the same was not competent testimony.

2. The court erred in charging the jury without qualification as follows: "I say to you as a matter of law in this "case, that if this corporation found this ditch there when it "came into a corporate existence as a part of the drainage "system of that locality, running along through one of these "streets or thoroughfares, it was bound in some form to pro-"tect the public against danger in the use of that thorough-"fare with the ditch in it, and it makes no difference for the "purpose of this case whether the ditch was a natural drain, "formed by nature and existing from time immemorial, or "whether it had been created by artificial means only a few "years prior to the formation of this corporation. If it was "there when the corporation came into existence, then they "were bound to accept it and provide for the safety of the "citizens against it, as they would any other obstacle that "threatened the safety of the citizens using the streets."

3. The court erred in charging the jury as follows: "No matter who covered it, whether the citizens covered it "at their expense, or whether the town covered it, it was a "covered sewer; that was the existing fact, and as such, it "was the duty of the town authorities, in as much as it was "in the roadway where the citizens were liable to pass back "and forth, to keep it in repair; and the fact that the corpo-"ration had changed its organization a few months prior to "this transaction, and had not yet reached the term of its "municipal year, when it could make any appropriations

"under the law under which it was then existing, does not "relieve it from the liability to keep their streets in repair."

4. The court erred in charging the jury as follows: "In regard to the first part of the defense, then, I will say "to you, if you find from the evidence in this case that the "place where the plaintiff received the injury complained of "was generally used by persons passing along said street and "on the west side of said street as a walk for foot passengers "and that the same was out of repair by reason of a large "hole therein, so as to be unsafe, and had been so out of "repair for some time, say several weeks, or, as some testi- "mony tends to show, from the preceding fall, and that the "plaintiff, while in the use of due care on her part, that is, "such care as a person of ordinary prudence would exercise "under the same circumstances, fell into the said hole and "was injured thereby, then the defendant is liable for the "damages directly resulting to the plaintiff from such injury; "and it makes no difference for the purposes of this case "whether it was originally intended that the cover of this "drain should be used for a sidewalk or not; if the public "accepted and used it as such without objection from the "town authorities, it was negligence on the part of the defen- "dant to leave it open in such a manner as to endanger the "persons who did use it."

5. The court erred in charging the jury as follows: "The evidence also shows, or tends to show rather, that it "had snowed the night before, with a violent wind, or a "20 mile wind, blowing from the North East. It is for you "to say whether those facts—that is, the snow and the wind

" combined—do not substantially corroborate the plaintiff in " that regard and show a state of facts that might have cov- " ered up this hole, or obscured it, so that she was unable to " see it."

6. The court erred in charging the jury as follows: " She " states that she had it in her mind that there was a hole there " and in endeavoring to avoid it, and in endeavoring so as to step " over it, or beyond it, stepped into it. The plaintiff admits, " as I said before, that she knew there was a hole, and knowing " that fact, she was bound to use due caution to avoid it; but if " you believe, from the evidence, that she did use such caution " as a prudent person would have used for the purpose of " avoiding it, and yet fell into it, then the defendant is liable, " because the very anxiety to avoid danger may sometimes lead " us into it. This person may have supposed that she was " stepping far enough to step over the hole which she knew " was there, and stepped just far enough to have stepped into " it, especially if you find that said hole was covered or ob- " scured by snow at the time. These are *facts*, however, for " you to weigh in the light of all the testimony."

7. The court erred in instructing the jury without qualification, as follows: " If you find that the plaintiff has made " out a case of negligence against the defendant, you will then " be justified in finding the defendant guilty."

8. The court erred in refusing to instruct the jury and to incorporate in its charge the following request:

" That the defendant is not liable for the alleged injury, if " at the time said injury occurred, the defendant, by the pro-

" visions of the general law for the incorporation of cities and " villages under which the defendant was then acting, had " not the legal ability, as well as the power, to make repairs " on its streets and sidewalks. If the evidence shows, that " the defendant became a municipal corporation or village " under the law mentioned, on October 15th, 1872, and that " no appropriations by ordinance had been made for the cor- " porate purposes of the defendant since that date and prior " to the alleged accident, then the jury are instructed, as " matter of law, that the defendant, during the interval of " time between its organization as a village on October 15th, " 1872 and the third Tuesday of April, 1873, and the pas- " sage and going into effect of an appropriation ordinance, " did not have the legal ability to raise and expend money for " repairs of streets and other corporate purposes, and in such " case is not liable for not repairing the place in question at " and prior to the time the plaintiff received her injury."

9. The Court erred also in not instructing the jury and in refusing the request, as follows: " That it must be proven " to the jury that the plaintiff, at the time of receiving her " injuries, was exercising ordinary care, and such as was suited " to the nature of the case, to avoid falling into the hole in the " drain-cover in question. Even though negligence on the part " of the defendant be made out, yet, if the evidence shows that " the plaintiff knew of the defect in question, and went in its " proximity, knowing also that there was a drain beneath, and " thereby exposed herself to danger, the plaintiff, by thus " exposing herself to danger, contributed to the injury, and " under such circumstances cannot claim a right to recover of " the defendant."

10. That the law upon the evidence in this case is with the plaintiff in error.

Wherefore, and for divers other errors, manifest and material in said record and judgment, said plaintiff in error prays that said judgment be reversed, and it be restored, etc.

BRIEF.

I.

The court erred in admitting to the jury the record entries, made by a person employed by the United States signal service at Chicago, for the purpose of showing the direction and velocity of the wind, the state of the weather, and that snow had fallen on the morning the plaintiff was injured (Record folio 32).

The plaintiff in error objected to these entries being read in evidence, as being incompetent, and not authorized by any law to be used as evidence in courts of justice, but the court overruled the objection and permitted the entries to be read to the jury, without any further verification and without calling as a witness the person who made the entries, or requiring proof that he was deceased. Exceptions to this were duly taken.

What was read purported to show that a snow-storm occurred on the morning of April 21, 1873, and continued until the evening of the next day, and that the wind blew at the rate of twenty miles an hour on the night of April 21st, and at the rate of twenty-four miles on the next morning and that snow fell at that time sufficient to make 17-100 of an inch in melted snow.

This was the only testimony in the whole case on the

points concerning the strength of the wind, the duration of the storm and the quantity of snow which fell. There was other testimony to the effect that it snowed at Evanston as severely as in Chicago, but none as to the wind and its velocity, the length of the storm, and how much snow fell either at Evanston or Chicago. The record did not purport to have been made at Evanston but at Chicago, ten miles distant. The object of introducing this testimony was undoubtedly to convince the jury that in the month of April, 1873, a reasonably warm month, there occurred a snow storm of such duration and violence and attended with such a high wind as to cause the hole in the drain-cover, six inches wide and nearly four feet long, to be so banked up with snow and obscured by drifts as to prevent the plaintiff from seeing the cavity on that morning. Under ordinary circumstances, falling snow would have in all probability sunk through a hole of such dimensions and gone to the bottom of the drain four feet below, leaving the cavity to a great extent visible, and so the jury would have been free to infer from the evidence had it not been for this testimony.

Hence this attempt to prove the velocity of the wind, the duration of the storm and the quantity of the fallen snow, was calculated to and did mislead the jury to believe, to the injury of the plaintiff in error, that the hole was caked over through these causes with snow or sleet in such manner as to prevent the snow from falling through, and to such an extent as to form a drift over the broken space in the drain cover. The admitting of this evidence, if incompetent, thus measurably deprived the jury of the fair opportunity they had, of exercising their judgments upon the facts in proof as

to the probability of the defect in the drain being rendered invisible to the plaintiff, and of weighing the truth of the testimony and what it proved, by their knowledge and judgment derived from experience, observation and reflection, and so arriving at the truth of the matter. It is sufficient to say that the jury were influenced by this evidence to the injury of the defendant.

The question is, was this species of evidence competent? We have been unable to find any Federal or other statute, giving to the memoranda of the numerous employes, most of them mere privates in the army, in the service of the chief signal officer of the army, the force and effect of records like those contained in the offices of the several executive departments of the general government or of the patent office and general land office. Sections 221—222 of the Revised Statutes state that the secretary of war shall provide for taking meteorological observations at certain points in the States, and for giving notice on the northern lakes and sea-coast, by magnetic telegraph and marine signals, of the approach and force of storms; and by the system of observations and reports in charge of the chief signal officer of the army, for such stations, reports, and signals, as may be found necessary for the benefit of agriculture and commercial interests. But none of these provisions give to the memoranda made by the station keepers the force and effect of record evidence. It may be said, that the documents on file at Washington in the office of the head of the signal service are to be treated as government records, and that they or authenticated copies are original evidence in the Federal courts; but however this may

be, the evidence introduced on the trial did not come from that source, nor was it claimed that it did.

It would seem necessary, therefore, that the facts stated in the record, excepted to, should have been authenticated by calling the person by whom they were made, if living, to testify to their accuracy, or if he was dead by showing that, and proving that the entries were made by him in the discharge of his duties. Even if it should be held that this book was an official register, because directed by the proper authority to be kept, it ought to have been shown that it was kept according to such directions.

Under certain acts of Congress log-books may be evidence of the facts they state, but only as to the matters designated by those acts, and they must be identified as duly kept. *U. S. v. Mitchell*, 2 Wash. Ct. Ct. 478; *U. S. v. Sharp*, Pet. Ct. Ct. 418. So, letters of administration upon the estate of a deceased person, issued by the proper Probate court, do not afford legal evidence of the death of such person. *Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S. 238. Neither is a certificate of naturalization evidence of the residence or age or good character of the applicant. Nor is the certificate of steamboat inspectors, under the act of Congress of 1852, evidence of the facts therein recited, when drawn in question by a stranger, although the officer was required by law to make a return of such facts. See cases cited in 91 U. S. p. 245.

In *Connecticut Mutual Life Ins. Co. v. Schwenk*, 94 U. S. 593, this court held, that "an entry in the minute-book of a lodge of Odd-Fellows, of which the deceased assured was a member, made prior to the issue of the policy, and

showing his age as recorded by the secretary of the lodge in the usual manner of keeping its records, is not admissible as evidence of such age. It is merely hearsay."

In *Chaffee & Co. v. United States*, 18 Wallace 516, a case in which the books, kept by canal collectors of tolls under an incorporated company of the State of Ohio, were introduced to prove certain facts therein contained, this court held that the books should have been excluded, applying "the general rule which governs the admissibility of entries in books, made by private parties in the ordinary course of their business, which requires that the entries shall be contemporaneous with the facts to which they relate, and shall be made by parties having personal knowledge of the facts, and be *corroborated by their testimony*, if living and accessible, or by proof of their handwriting, if dead, or insane, or beyond the reach of the process or commission of the court."

Now in the case at bar, the evidence offered, as the bill of exceptions says, was a record kept by a person employed by the United States signal service at Chicago. By whom it was kept, except that the person was an employe, and when the entries were made, whether contemporaneously with the purported facts recorded or at some other time, does not appear. Neither does it appear that the employe had any personal knowledge of these purported facts, nor was he called to corroborate the entries by his testimony, and it was not even attempted to be shown that he was dead, insane, or beyond the reach of the process or commission of the court. He was not produced as a witness to verify the statements in this so-called record.

It was not even shown that he was an officer of the government, authorized to make any such entries, nor that it was his duty to make the entries or the observations of the weather noted in the book, nor that he entered them there by direction of one whose duty it was to make such observations. In fact, it does not appear but that it was the private memorandum book of some employe at the Chicago station, having no connection whatever with the regular business of the observer at that station. The book was admitted and read from without any verification or corroboration. It was not a public record, nor had it any authority under any statute to free it from the ordinary conditions of evidence, applicable to private books of entry.

Treating this entry as to the wind and its velocity and the depth of the snowfall as a private memorandum, useful it may be in the collection of general statistical information, but nevertheless incompetent, because it was not corroborated as required by the rules of evidence and therefore was mere hearsay, it should have been excluded from the jury.

II.

The court erred in its charge to the jury, in giving the instructions mentioned in the 2d, 3d, 4th and 5th assignments of error, and also in refusing the request of the plaintiff in error, set out in the 8th assignment of error.

By refusing the instruction asked for, and by giving those above mentioned, the court ruled that the defendant was liable for a defect in a cover to a drain within its limits, which it had not built and had not authorized to be used as a sidewalk,

and for an injury alleged to have resulted therefrom soon after its organization as a municipal corporation, without regard to the question whether or not under its charter, at the time of the injury it had the legal ability and means of keeping its streets in repair. The court told the jury expressly, that "the fact that the corporation had changed its organization a few months prior to this transaction, and had not yet reached the term of its municipal year, when it could make any appropriations under the law under which it was then existing, does not relieve it from the liability to keep this street in repair." In other words, the court said, although the corporation had been but just created and was prevented by the provisions of its charter from raising money by taxation or otherwise, or from making contracts, for the purpose of keeping its streets and sidewalks in repair, still, according to the charge, it was guilty of a breach of duty in not making such repairs, and liable in damages for injuries received during this period of its legal inability to raise the necessary means to repair with. Such is the effect of this instruction.

Now, the evidence is that the defendant became incorporated on Oct. 15th, 1872, under the general incorporation law of Illinois for villages, in force July 1, 1872, and consequently was from Oct. 15th subject to and governed by the provisions of that act and none other. It found within its limits, and in a public street, a drain, which was put there by legislative authority and was under the control of an entirely different corporation, called "Drainage Commissioners." It was in precisely the same situation with respect to the drain, as other municipal corporations are with respect to canals or railroads

running through them under prior legislative enactments, and over which they have no control. The village had no authority to fill up or remove this drain. Neither it nor its predecessor had built a sidewalk, or authorized one to be constructed, on the top of the drain between Church and Clark streets. All its predecessor, the Town of Evanston, had ever done concerning the ditch was to facilitate the flow of water and to protect the sides of the drain by deepening the drain in places and boarding its sides, and to make street crossings over it. The gist of the action, however, was not negligence in having a drain there in a street, nor in the manner of its construction. For a sewer in a public street is not a nuisance *per se*. *Brooks v. Boston*, 19 Pickering 174. And what the legislature has authorized in a public street is not a nuisance. Shearman on Negligence, sec. 363, note 6. The gravamen was a breach of duty in allowing a board in the cover of the drain to be broken and to remain broken after notice of the defect. Nothing is alleged against the character or sufficiency of the drain cover, for a walk even, in any other respect. The evidence shows that the board was broken in the fall of 1872, but whether before or after the organization of the village, the bill of exceptions fails to disclose. It appears to have been mended afterwards by a neighboring lot-owner, but to have been accidentally broken again, and to have so remained for several weeks prior to the day of the plaintiff's alleged injury on April 22d, 1873.

The village, therefore, did not succeed to any liability incurred by its predecessor, the old town, nor was it saddled with any breach of duty on the part of the old town, as some of the counts in the declaration by mistake assume. The

alleged breach of duty occurred, according to the evidence, after the organization of the village. Even if the evidence, as to the first breakage of the drain cover by an omnibus in the fall of 1872, could be presumed to refer to any day before the 15th day of the fall month of October, 1872, there would still be lacking the requisite evidence to establish any liability or breach of duty on the part of the old town, for there is no evidence of any actual notice to the town authorities or the defendant, and there is no testimony at all of any lapse of time whatever after the breakage and before the organization of the new corporation, from which the law could infer such notice, which is essential to create a liability on a municipal corporation in this class of cases.

Fahey v. Town of Howard, 62 Ill., 28.
City of Peru v. French, 55 Ill., 322.
Mayor v. Sheffield, 4 Wallace, 195.

The evidence, therefore, warrants the assertion that the alleged breach of duty, if any occurred at all, occurred wholly in the space of time, elapsing between the organization of the village on October 15th, 1872, and April 22d, 1873.

Now, it is in precisely this period of time that it is urged here, that this village did not have the legal ability to provide the means for keeping its streets, sidewalks, and drains in repair, and consequently could not be guilty of a breach of duty in that regard during that period.

This will appear from an examination of the defendant's charter.

Section 88, Art. 7, Rev. Stat. of Illinois, p. 227, fixes

the commencement of the fiscal year at the date established for the annual election, which date by section 190, p. 243, occurs on the third Tuesday of April in each year. Section 89, p. 227, provides, in the case of villages, that the board of trustees, "shall, within the first quarter of each fiscal year, pass an ordinance, to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to pay all necessary expenses and liabilities of such corporation. * * * No further appropriations shall be made at any other time within such fiscal year, unless the proposition to make such has been first sanctioned by a majority of the legal votes of such village, either by a petition signed by them, or at a general or special election duly called therefor."

Section 90, p. 227 provides that, "Neither the board of trustees, nor any department or officer of the corporation shall add to the corporation expenditures in any one year anything over and above the amount provided for in the annual appropriation bill of that year, except as is herein otherwise specially provided; and no expenditures for an improvement to be paid for out of the general fund of the corporation shall exceed in any one year, the amount provided for such improvement in the annual appropriation bill; Provided, however, that nothing herein contained shall prevent the board of trustees from adding by a two-thirds vote, any improvement, the necessity of which is caused by any casualty or accident, happening after such annual appropriation is made. The board of trustees may, by a like vote, order the president of the board of trustees and finance committee to borrow a suffi-

cient amount to provide for the expense necessary to be incurred in making any improvements, the necessity of which has arisen as is last above mentioned, for a space of time not exceeding the close of the next fiscal year, which sum, and the interest, shall be added to the amount authorized to be raised in the next general tax levy, and embraced therein." The remainder of the section provides for the payment of judgments, in the case of judgments being obtained against the corporation.

Section 91, p. 227, provides, that "No contract shall be hereafter made by the board of trustees, or any committee or member thereof, and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the board of trustees or not, unless an appropriation shall have been previously made concerning such expenses, except as herein otherwise expressly provided."

Section 111, p. 231, requires the amount of the appropriations made for the fiscal year to be levied and raised by taxation, in the shape of an ordinance which is to be filed on or before the second Tuesday in September in each year, (changed in May 1873 to August.) Rev. Stat., p. 878, Sec. 122. By section 135, Revenue act, p. 880 of the Rev. Statutes, these taxes are not collectable until from and after the following December.

In this case, there was no fiscal year for the defendant, beginning on the third Tuesday of April 1872, since the charter itself did not go into force until July 1st 1872, and

the village was not organized until October 15th 1872. Its first fiscal year did not begin by the statute, then, until the third Tuesday of April 1873. Between that third Tuesday and the same day in July 1873, the statute authorized it to make the necessary appropriations for its corporate needs and expenses. All expenditures and expenses, it could make during such year, were to be based upon the appropriations so made during that first quarter. It had been organized as a village in October 1872, but the machinery necessary to perfect its organization and to enable it to provide the means of carrying on its government, paying its expenses and keeping in repair its streets and sidewalks, did not fully go into operation under this law until the third Tuesday of April 1873. It was prohibited from making any expenses or contracts under its charter, until it had passed an annual appropriation bill; and the charter fixed the time for the passage of that in the first quarter of its first fiscal year, beginning on the third Tuesday of April 1873. Without such an appropriation being first made, its corporate authorities were prohibited by section 91, above quoted, from making any expenditures or incurring any expense, in the exercise of the corporate functions of the village. While it was thus prohibited, it cannot be claimed that it was under any duty to repair streets and sidewalks, for all such repairs involve expense, outlays of money, more or less, in the employment of laborers and the purchase of materials. Being without the ability to raise the fiscal means under its organic law before the third Tuesday of April 1873, its duty to take charge of its streets did not become complete until that date at least, and ~~with~~ until it had had time, thereafter, to put in force the

requisite ordinance justifying expenditures for corporate purposes.

The accident to the plaintiff occurred on the 22d day of April, 1873. The first day of the fiscal quarter fell upon the 15th day of April, 1873, just seven days before the accident. If it be said, that an annual appropriation ordinance could have been made legitimately within the first quarter of this fiscal year and previously to the accident, say on April 15, the answer is, that it would not have taken effect and become a law under which expenditures could be made, until after the lapse of ten days from its passage, and not until the 25th of April, three days after the accident, for the 64th section of the charter, p. 223, Rev. Stat. of Ills., provides that "all ordinances making any appropriation, shall, within one month after they are passed be published at least once in a newspaper published in the village, or if no such newspaper is published therein, by posting copies of the same in three public places in the village; and no such ordinance shall take effect until ten days after it is so published."

Municipal corporations have only such powers as are expressly granted to them, or are incidental to those granted.

Town of Petersburg v. Metzzer, 21 Ill. 205.
Sherlock v. Villageof Winnetka, 68 Ill. 532.

"Neither the corporation nor its officers can do any act, or make any contract, or incur any liability not authorized by its charter. All acts beyond the scope of the power granted are void. Much less can any power be exercised or act be done which is forbidden by statute." DILLON

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ON MUNIC. CORP., SEC. 55. And, "it is a familiar principle, that where a statute points out a particular course to be pursued to effect a particular purpose, no other course can lawfully be pursued." *County of Hardin v. McFarlan*, 82 Ill. 139; and so it was held in the case of highway commissioners in Illinois, "that the statutes conferred upon them no authority to expend money on roads and bridges in their towns or districts, which is not in the treasury to be expended, or which is not actually provided for by a levy, and that they cannot anticipate a tax to be afterwards levied. The policy of the law is that no expenses should be incurred in the absence of money already levied to meet them."

Braun v. Town of Peoria, 82 Ill., 11, 16, 17,

Nor have they legal power to incur indebtedness for road and bridge purposes, in any fiscal year, beyond the amount of the taxes already levied for that year. *Commissioners of Highways v. Newell*, 80 Ill., 588.

It will doubtless be urged in reply to this view, that the liability of a municipal corporation to respond in damages for injuries of the kind claimed in this case, has been settled by repeated adjudications, and that the question is not open to argument. But we apprehend that in the long list of cases which might be cited to show this, the underlying principle, upon which this liability is based, has been found to exist, namely, that the corporation, sought to be made liable, has been given by its charter the necessary powers, and at the same time furnished with the necessary means, to prevent the occurence of the causes of such injuries, and that by not mak-

ing use of these means under their powers, in due season, the corporation is liable for a breach of duty in the exercise of its franchises. In no case, we believe, has this liability been maintained, where the power and the means of executing it were not ample and sufficient, and could not have been legally and freely exercised before the happening of an alleged injury.

Thus, in the leading case in Illinois, *Browning v. City of Springfield*, 17 Illinois 143, it was held, "that an action for damages will lie against a municipal corporation, if the duty to make repairs is fully declared, and adequate means are put within the power of the corporation to perform this duty," the court saying, on p. 146: "The simple deduction, which may be drawn from the case, is, that where a specific duty to repair is fully and completely enjoined, and full and adequate power and means are provided or put within the power of the person or corporation to provide, the obligation is perfect, and liability for neglect is reciprocal."

In *Weightman v. City of Washington*, 1 Black (U. S.) 39, or 4 Miller 349, this court held in like manner that, "where a municipal corporation is required by law to perform certain duties for the general interest, or to build bridges and the like, and *is furnished with the necessary means* and authority to perform the duty well, they are responsible for injuries arising from the neglect of such duties."

That the means of accomplishing the duty is an essential element of the obligation is also held in *Nebraska City v. Campbell*, 2 Black 590, or 4 Miller 848, in which case it is said that, "the law is well settled that municipal corporations,

upon which the duty is imposed to construct and keep in repair, streets, bridges, etc., and upon which are *conferred the means of accomplishing this duty*, are liable for any special damages growing out of a neglect of this duty."

Again: The jury were told by the court in the portion of the charge excepted to and set out in the second assignment of error, as a matter of law "that if the defendant found the drain within its limits, when it came into a corporate existence, it was bound to protect the public in the use of Sherman avenue from danger, and that it made no difference whether the ditch was a natural drain, or whether it was formed by artificial means before the organization of the defendant. If the ditch was there when the defendant came into existence, it was bound to accept the ditch and provide for the safety of the citizens against it, as they would any other obstacle that threatened the safety of the citizens using the streets." (Record pp. 18, 19); and further on, the court told the jury that no matter who covered the drain it was the duty of the defendant to keep it in repair, and whether the cover was intended for a sidewalk or not, if the public accepted it and used it as such without objection from the town authorities; and the court likens the matter to a case where municipal authorities have allowed a hole to be dug in one of its streets by a stranger and to remain open.

This instruction ignores the evidence in the case. It was not a case like the digging of a hole in a public street of an incorporated town by some private person and the town suffering the hole to remain open. There was no evidence in the case, showing that the defendant had any authority over the

drain. On the contrary, it stands proven that the drain was constructed under the authority of the legislature of Illinois, by a distinct corporation called Drainage Commissioners, whose duty it was by the terms of the law incorporating them to keep the drain in repair. It was made their duty to repair and not that of the defendant. There is nothing in the evidence to show that these drainage commissioners have ever abandoned the drain or that it has ceased to be under their control. For aught that appears they are still exercising their corporate powers. They did not get their authority to build the drain and to control it, nor any permission so to do, from the defendant, because they and their drain were there before the defendant and its predecessor were incorporated.

The case therefore, in this respect, is unlike those suits in which municipalities have been held liable where they permit a railroad to lay its track in its streets with a covenant that the railroad shall keep in repair so much of the street as is contained between the rails, and an injury to travelers occurs from a failure to keep the covenant. The drain was in the street under the control of the other corporation and without the act or consent of the defendant. Which of the two corporations, the drainage commissioners or the defendant, was bound to keep the drain and its covering in repair? Which had the control? Does the fact that the drain ran through the street put the defendant, under these circumstances, under any obligation to take charge of the drain and keep it up? If so, why should not the rule be extended to telegraph poles and the like, which the legislature has authorized to be set in

the streets of a town or city by some incorporated company, and so hold the town responsible for all injuries that may result to passengers and carriages by reason of the poles being in the roadway? But in such a case, it is held in Massachusetts in *Young v. Yarmouth*, 9 Gray, 386–390, that the town is not liable, for the use of the streets for telegraph poles, having been authorized by the legislature, the municipality cannot interfere with them, and is not responsible to persons using the highway for injuries occasioned by the presence in the road of the telegraph poles. So, too, in *City of Joliet v. Verley*, 35 Illinois 58, it was held, that the trustees of a canal cannot, by building a bridge over their canal within the limits of a city, impose upon the city the burden of keeping it in repair, and that until the city assumes control over a bridge erected without its assent or authority, it is not liable for its not being kept in repair. And this was where one of the principal streets of the city passed directly over the bridge; and although the city was held liable in the case for an injury, yet it was on the ground that the injury occurred on an approach to the bridge, which the city itself had constructed.

In *Reed v. Town of Cornwall*, 27 Connecticut 49, a highway ran through the corporate limits of a town, and belonged to the town, but afterwards came under the control of an incorporated turnpike company. Then the turnpike company abandoned it and some repairs were made by the town officers. In a suit for an injury, occurring on the highway under this condition of things, it was held by the court that the duty to repair was on the turnpike company, and that the town was not liable in damages for the injury.

If it be claimed that the defendant's predecessor, the old town of Evanston, had become charged with the duty of maintaining the drain from the fact, that it had on one occasion made a few repairs on the drain by deepening it and putting some board sidings in places, the duty does not follow, for it is held in *Munn v. Pittsburg*, 40 Penn. State 364, that the mere fact that a city corporation has occasionally made repairs on a sewer is no evidence of a voluntary assumption of the duty of maintaining it on the part of the city. It is not a case of dedication to public use, whereby the corporation becomes bound to repair by adopting it, so that the making of repairs becomes evidence of adoption.

But whether or not the making of these repairs would make the defendant liable for an injury resulting from them or from the use of the drain, as a drain only, it is quite clear, from the evidence in the case that the defendant had never accepted the cover laid on the drain, as a sidewalk, nor had it ever authorized or directed it to be built, or to be used, as a sidewalk.

It was built by private adjoining lot owners, and if it was dedicated by them to the public as a sidewalk it was nevertheless never accepted by the defendant, either by repairing it, or by any other act of a corperate character. Mere travel by the public is not evidence of its acceptance as a sidewalk. It is so held by the Supreme court of Illinois, in *Forbes v. Balenseifer*, 74 Illinois, p. 187, the court saying: "It has been said many times by this court, and if any principle is settled, it is that a dedication, to be valid and binding, must be given by the owner of the land to the public for a highway, and must have been accepted and appropriated

to the use intended; that there must be evidence of acceptance, and until there is the owner may withdraw his offer and appropriate the land to any other purpose he may choose; that an acceptance can be evidenced by the public officers taking charge of the road and repairing it at public expense, or where it needs no repair, by placing it on the map of roads for the proper district, and by its being used by the public; but mere travel by the public is not evidence of an acceptance."

It cannot therefore be claimed that the *locus in quo* of the injury in this case, was a sidewalk of the defendant, constructed by its authority, or accepted by it by any act of its corporate authorities, recognizing it as a public sidewalk of the defendant corporation. The drain and cover stood upon property under the control of another corporation, over which the defendant had no control, and which had the precedent right to occupy the street, and with whose rights and powers the defendant could not interfere.

If there was any gift by the private lot owners of the drain-cover, it was to the drainage commissioners, who owned and controlled the drain. The defendant had no authority to enter upon the property of the commissioners, and exercise control over it, or divert it to any use for which it was not constructed.

Being thus situated with respect to the prior corporation, and the property of the drainage commissioners, the defendant was under no legal liability to keep the drain covering in repair for the purpose of a sidewalk.

It is respectfully submitted that under the evidence, the

refusal to give the special request asked, and the giving of the portions of the charge, excepted to on the trial and set out *in totidem verbis* in the 2d, 3d, 4th and 5th assignments, were materially erroneous and prejudicial to the defendant. If the latter had not been given, or had been suitably qualified, the verdict of the jury would have been different.

III.

On the question of negligence, the court erred in its charge to the jury, and in refusing the special request of the defendant on that question as prayed.

Looking at the question of negligence alone, without reference to the matters presented in the preceding portions of this brief, it is urged that the charge of the Circuit court was erroneous in its manner of applying the law of negligence to the facts in evidence.

The court was asked to instruct the jury as follows:

"That it must be proven to the jury that the plaintiff, at the time of receiving her injuries, was exercising reasonable care, and such as was suited to the nature of the case, to avoid falling into the hole in the drain-cover in question. Even though negligence on the part of the defendant be made out, yet, if the evidence shows that the plaintiff knew of the defect in question and went in its proximity, knowing also that there was a drain beneath, and thereby exposed herself to danger, the plaintiff, by thus exposing herself to danger, contributed to the injury, and under such circumstances cannot claim a right to recover of the defendant."

The court refused this request, giving as a reason that the request was substantially embraced in the charge.

Examination of the charge, however, fails to show that the substance of this request was given to the jury. The latter branch of the request is entirely omitted, nor is there, we think, any language in the charge, which can be construed as equivalent to it.

In one portion, the court said: "If you find from all the evidence in the case that the defendant was guilty of negligence, it will then be your duty to fix the amount of damages which the plaintiff should recover in this case." (Printed Rec., p. 18, folio 41.) And in another:

"If you find that the plaintiff has made out a case of negligence as against the defendant, you will then be justified in finding the defendant guilty." (Printed Rec., p. 18, folio 43.)

This language, taken by itself, would seem to imply that the negligence of the defendant alone was to be considered by the jury, and, in the connection in which it was used, had a tendency to lead them to misconstrue the meaning of the court.

It is true in a preceding part of the charge, the court said to the jury: "If you find from the evidence, that the accident to the plaintiff occurred by reason of her own negligence or want of due care, then the defendant is not liable (Rec., p. 16, folio 38); and again, "the plaintiff admits, as I said before, that she knew there was a hole, and knowing that fact, she was bound to use due caution to avoid it; but if you believe, from the evidence, that she did use such caution as a

prudent person would have used for the purpose of avoiding it, and yet fell into it, then the defendant is liable, because the very anxiety to avoid danger may sometimes lead us into it. This person may have supposed," etc. (Rec., p. 17, folio 39.)

But we submit that this way of putting it fell far short of the request, and rather tended, when considered with the context, to obscure the presentation of the point to the jury. Surrounded as the statement was with the court's exposition of the evidence, including a statement by the court that the wind blew from the northeast, which was not in evidence at all, and with another statement to the effect that the plaintiff was endeavoring to step so as to step over the hole, or beyond it, and in so doing stepped into it, when in fact the plaintiff testified simply that she stepped as she thought away from the hole, a material misconception of the evidence as to the plaintiff's action on the part of the court, and coupled as it was with comments and suppositions concerning this part of the evidence, we insist that the charge in this respect lost all weight with the jury by reason of its surroundings.

But however this may be, the charge did not present to the jury, as matter of law, as the refused request sought to do, that a person has no legal right knowingly to go upon a dangerous walk, and in the proximity of a defect therein of the character and location of the one described in this testimony, well knowing that such defect exists, and with such knowledge use the walk at personal risk, without being subject to the charge that by thus exposing himself to danger he contributes to the injury, and cannot in such case recover for injuries sustained.

The request contained this proposition, but the charge did not. If the request, under the facts of this case, was proper, it should have been given. That the proposition it embodies was the law, we think is supported by numerous adjudications.

In *Lovenguth v. City of Bloomington*, 71 Illinois R. p. 238—241, it was held: "A party has no right to knowingly expose himself to danger, and then recover damages for an injury which he might have avoided by the use of reasonable precaution. And an instruction to the effect, that the plaintiff was not bound to travel on another sidewalk than the one on which he received the injury, even though he knew that the one on which he was injured was out of repair, was properly refused."

In *Village of Kewanee, v. Depew*, 80 Illinois 119—120, where a person, walking in daylight on a sidewalk through which there was a hole, stepped on a board next to the hole and slipped, the plaintiff's judgment was reversed, the court saying, "A person in the full possession of his faculties, passing over a sidewalk in daylight, with no crowd to jostle or disturb him, no intervening obstacle to obscure approaching danger, and no sudden occurring cause to distract his attention, is under obligation to use his eyes to direct his footsteps, and if he fails to do so he is negligent."

In *City of Quincy v. Baker*, 81 Illinois, 300–304 the court said, "While the law requires a municipal corporation to keep its streets and sidewalks in a safe condition, and clear of all dangerous obstructions, yet a person who travels over the streets has no right recklessly to walk into danger, and

if he does so he cannot recover for an injury received. If a person, who is acquainted with a sidewalk over which he is passing in daylight, walks upon a portion which is obstructed with an accumulation of ice, when there is plenty of space on either side for him to pass along and avoid such obstruction, he is guilty of such want of care as to preclude his recovery for any injury he may sustain by reason of such obstruction."

In *City of Centralia v. Krouse*, 64 Illinois, 20, "Where the sidewalk was rendered almost impassable by fire, so that the danger of passing over it was apparent to every one, and there was a safe walk on the other side of the street, and the plaintiff, being advanced in years, attempted to pass over the damaged walk, in daylight, knowing its condition and that it was covered with sleet and ice, when he might easily have avoided it, and in so doing fell and was injured: Held, in a suit by him against the city, that the injury must be attributed to his own folly and culpable negligence."

So, in *Wilson v. City of Charleston*, 8 Allen, 137, it is said, "That if a person knows a way to be dangerous, when he enters upon it, he cannot in the exercise of ordinary prudence proceed and take his chance and sue the town; and that a person, who voluntarily attempts to pass over a side walk which he knows to be dangerous by reason of ice upon it, when he might easily avoid it, cannot maintain an action against the town to recover for injuries sustained by falling on the ice."

So, in *Clancey v. Byrne*, 58 Barbour S. C. R. 452, "If persons using a pier know it to be unsafe for use, and

with that knowledge use it, and sustain loss, it is clear that the doctrine, that one who contributes to an injury cannot recover for such injury, applies." In this case an instruction to the effect, that if the jury found from the evidence that the pier was dangerous to drive over, and the plaintiff knew it, he could not recover, was refused. Held, the refusal was error, sufficient to reverse.

So, in a case in the Circuit court for the Northern District of Illinois, *Seymour v. C. B. & Q. R. R.*, reported in 3d vol. Chicago Legal News, p. 300, Mr. Justice Davis charged the jury: "On the question of contributory negligence, if at any moment it would have appeared to a reasonable and prudent person, that there was risk of danger to herself in proceeding, then if she did proceed, it was at her own peril, even if the defendant was guilty of negligence * * and if the jury find from the evidence that she contributed to the accident they will find for defendant."

So, in the case of *Raymond v. City of Lowell*, 6 Cushing 525–536, where the plaintiff undertook to cross a street in the city of Lowell, at a place where the grating of a sewer protruded above the sidewalk, and tripped on the grating and was thrown down and injured, it was held that he could not recover of the city for the want of ordinary care, and that the existence of the defect did not of itself give a right of action, though it was a paved street.

The legal principle, contained in the refused request, runs through all these cases and many more that might be cited.

The evidence shows that the plaintiff's case falls within the rule of contributory negligence. It is apparent from her

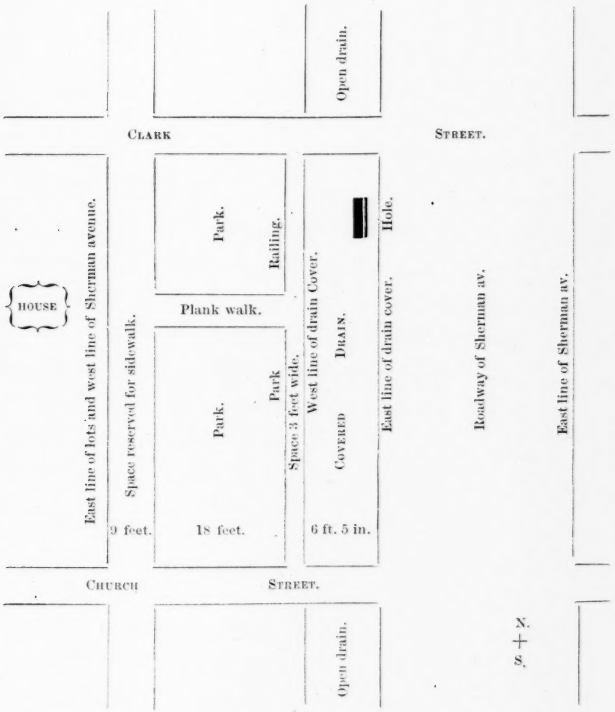
own testimony, that she had previous and ample knowledge of the character of the drain, and of the precise nature and location of the defect in its covering. It shows also, that she had ample opportunity and means of avoiding it safely on the occasion of her alleged injury. It shows that she omitted to do what a prudent person, with her knowledge of the situation of things would have done on that occasion, namely, refraining from going near the hole in the drain-cover, by taking the usual sidewalk space, or at least by walking between the drain-cover and the park fence a short distance, or, if this did not suit her, by keeping on the west side of the drain-cover; either of which means would have taken her safely by the broken place.

1. *Her previous knowledge.* The evidence is conclusive on this. The bill of exceptions (Printed Record p. 12 folios 27, 28) says: "The plaintiff knew of the existence of the hole in the walk, and its locality, for a period of about four months or more prior to the injury, and had been in the habit of passing by it daily on her way to and from school at least four times a day, and had always theretofore passed it safely and without difficulty." It also appears that she lived in a house close by. Also, that on that very morning, "it occurred to her, and it was present in her mind that there was a hole in the walk, and that as she stepped from the walk leading from the house to the alleged sidewalk, which was the covered drain, she thought of the hole, and thought she knew where it was," etc. She knew also it was not a regular sidewalk, not only from its location thirty feet out in the street, and the fact that there was a space nine feet wide, open and clear for a sidewalk,

directly in the way she was going, but also from the fact that the drain was covered only for a short distance and remained open and uncovered in all other places.

2. *Her opportunities of avoiding the place.* Actual measurements, taken of the locality, show that the distance between the front fence of the house, where the plaintiff lived, and the west line of the drain out in the street was thirty feet and five inches, and was occupied in the following manner: First, next to the house fence, by a space for the usual sidewalk, nine feet wide, which ran without obstruction to the sidewalk on the street north, leading to the school-house whither the plaintiff was going, and was of hard, dry sod and could be used by foot passengers without difficulty. Next and east of the sidewalk space, by a park for trees about eighteen feet wide. Running along the east line of this park was a railing, and between the railing and the west line of the drain was a space on the ground three feet wide, along which and without going on the top of the drain at all there was free passage. Next came the drain cover, six feet and five inches wide. The boards forming the cover, over which the plaintiff saw fit to walk, were laid lengthwise, that is, north and south over cross-pieces laid laterally across the drain. The hole was six or eight inches wide and from two to four feet long, was located six inches from the east side of the covered drain (p. 14, folio 33), and as it was east of the center of the drain (folio 28) is thus shown to have run lengthwise of the drain. Adding to these six inches the width of the hole which was six or eight inches, it thus appears, that on the top of the drain cover and west of the hole there was ample room on the drain cover, to the

width of five feet and four inches or five feet and three inches at least, for the plaintiff to have passed along, without stepping near the hole. The annexed diagram, framed from the facts contained in the bill of exceptions, may illustrate this better :



There was ample opportunity for the plaintiff with her familiar knowledge of the place, to have avoided all possible

danger. It was daylight, about the usual morning school hour. If she had chosen, she could have gone safely and more directly, too, to her school, along the usual sidewalk space next to the house fence, for she testifies herself "that if she had on this occasion gone along this open passage way left for a sidewalk she would have avoided the proximity of the hole," (folio 28); or if not desiring to take that way, she had stepped along the space on the ground three feet wide, between the park railing and the drain, until safely beyond the hole, there was nothing to prevent her taking that prudent course, for she herself testifies again, (folio 28): "If she had on this occasion chosen to walk on the ground between the park railing and the drain-cover, instead of on the drain, she would have avoided the hole, but that she did not at the time think it was necessary to do so." The plaintiff also said in her testimony that she stepped, as she thought, away from the hole, and while trying to avoid it stepped into it. How this could well be, under the facts in evidence, can be accounted for only on the hypothesis that she was going directly across the drain into the street, or while on the drain-cover moved along in a reckless, heedless, and inexcusable manner. As she came down from the house on her way to the school over the planks, laid from the house fence through the park, she was going east, and on arriving at the drain-cover and after stepping up upon it in order to go to her school, she would have to turn to the north, or her left, and as the hole, according to the evidence, was on the extreme east side of the cover some feet north of the passage leading through the park, there was, as we have shown above by actual measurements, a clear and unbroken space of five feet or more before her on the drain-

cover west of the hole, which she could have traversed with ease and safety. In order to get into the hole, or even near it, she must have crossed over to the east side of the drain cover, and thus recklessly and imprudently walked immediately into the danger, which, notwithstanding the snow, she knew from her previous observation of many weeks lay on the east side of the alleged walk.

In the case of the *Baltimore & Potomac R. R. Co. v. Jones*, 95 U. S. p. 441, it was held, Mr. JUSTICE SWAYNE delivering the opinion; that "negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. One who by his negligence has brought an injury upon himself cannot recover damages for it. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: (1) Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of proper care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case the plaintiff is entitled to recover. In the latter he is not."

The application of the latter branch of this rule was

made in that case by this court to a plaintiff, who saw fit to ride on the engine instead of in a box car of the train on which he was going. And the question was raised, as in the case at bar, by the refusal of the court below to give a request, to the effect that if the plaintiff knew his position was a dangerous one the jury should find for the defendants. This court held that it was error to refuse such an instruction and reversed the case.

In the case at bar, though the facts are different, the same knowledge of the danger and the same reckless disregard of precautions which a prudent person in the like situation had the opportunity of taking and would have taken to avoid that danger, existed, as in the case cited. The plaintiff on the occasion of her injury saw fit to omit doing what a reasonable and prudent person would have done under the circumstances of the situation, and she did, just what such a person under the existing circumstances would not have done. She saw fit in broad day light to walk in a place, ordinarily sufficient as the covering of a drain, but not devoted by any corporate act of the plaintiff in error as a sidewalk for foot passengers, with full and ample knowledge on her part of its defects, and its inferiority to the regular sidewalks of the corporation, and of the risks to be encountered in so doing. The degree of care, which it was incumbent on her to have exercised, must be measured by the known perils she voluntarily chose to encounter.

But it may be urged for defendant in error that the facts on the question of negligence in this case were submitted to the jury, and that they have passed upon them by their verdict.

Just so it might have been urged here in the case cited from 95 U. S. 439, and in all the other cases cited, which have been reversed contrary to the findings of the jury. Doubtless, negligence, ordinarily, is a question of fact, in respect to which the verdict of a jury, when supported by proper evidence and guided by proper instructions from the court, should be regarded as conclusive; but the application of this principle has never been extended to an unreasonable extent nor literally conformed to. This court had no difficulty in disturbing the verdict of the jury in *Railraod Co. v. Jones*, nor has any other court of record experienced any such difficulty, especially when the conclusions of the jury were misdirected or embarrassed by the partial or faulty instructions of the *nisi prius* court.

It is urged for the plaintiff in error, that the Circuit court failed in its charge to sufficiently advise the jury with respect to the question of negligence, and that in consequence of the error complained of, the plaintiff in error was materially injured on the trial.

The case for the plaintiff in error is respectfully submitted.

GEORGE O. IDE,

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